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NOTE

Prejudgment Interest and the Copyright Act of 1976

INTRODUCTION

At the beginning of a lawsuit, plaintiffs often give relatively scant attention to whether prejudgment interest¹ is available.² In a perfect world, there would be little need to do so, as the fruits of legal victory would give way to clear and unambiguous remedial rules. Unfortunately for copyright plaintiffs, the remedial provi-

1. Prejudgment interest is the "interest that may be awarded on [a] claim from the time it was originally due until the time of the judgment." DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.5, at 164 (1973). It is important to distinguish prejudgment interest from judgment or postjudgment interest which "accrues from the time the judgment is entered." *Id.* Under federal law, postjudgment interest is awarded pursuant to statute. *See* 28 U.S.C. § 1961 (1988). The circuit courts have universally held that this statute does not bar awards of prejudgment interest in otherwise silent statutes. *See, e.g.,* Poletto v. Consolidated Rail Corp., 826 F.2d 1270, 1274 (3d Cir. 1987) (collecting cases addressing this issue); Wildman v. Burlington N. R.R., 825 F.2d 1392, 1396 (9th Cir. 1987) (same); Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988, 989 (6th Cir. 1982) (same). In 1982, Congress attempted to pass an amendment to the postjudgment interest statute which would have permitted the federal courts to award prejudgment interest under any federal statute. *See infra* note 65.

2. *See, e.g.,* Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 194 (1982) ("[O]ne common problem recurs in prejudgment interest case law: the issue of interest does not arise at all unless the plaintiff receives a judgment and, even then, interest usually receives cursory attention at the end of a case after resolution of the liability issue.") (footnote omitted); Joel A. Williams, Comment, *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 CUMB. L. REV. 521, 521 (1977) ("[Prejudgment interest] is often relegated to an insignificant position and asked for only as an afterthought to an otherwise successful lawsuit." (citing Richard T. Apel, Comment, *Interest as Damages in California*, 5 UCLA L. REV. 262 (1958))); Recent Developments, *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107, 107 (1962) ("The subject of interest as damages has received rather cursory treatment in judicial decisions because of the natural preoccupation of court and counsel with the larger issue of liability.") (footnote omitted) [hereinafter Stanford Note]. Nonetheless, the significance of prejudgment interest should not be overlooked. For example, in a leading United States Supreme Court case on the subject, a plaintiff recovered \$8,813,945.50 in actual damages and \$11,022,854.97 in prejudgment interest. *See* General Motors Corp. v. Devex Corp., 461 U.S. 648, 651 (1983).

sions of the Copyright Act of 1976,³ from awards of statutory damages to the calculation of profits and actual damages, are fraught with imprecision and uncertainty.⁴ One such area of ambiguity is whether prejudgment interest is available in awards for actual damages⁵ under the 1976 Act.⁶

3. 17 U.S.C. §§ 101-914 (1988 & Supp. V 1993) [hereinafter Act of 1976 or 1976 Act].

4. See generally Alois Valerian Gross, Annotation, *Measure of Statutory Damages to Which Copyright Owner is Entitled Under 17 USCS* [sic] § 504(c), 105 A.L.R. FED. 345 (1991); Alois Valerian Gross, Annotation, *Measure of Damages and Profits to Which Copyright Owner is Entitled Under 17 USCS* [sic] § 504(b), 100 A.L.R. FED. 258 (1990). For a brief discussion of the 1976 Act's statutory damages provision, see *infra* note 5. For the 1976 Act's definitions of actual damages and profits, see *infra* note 78.

5. Under the 1976 Act, plaintiffs can elect to recover either actual or statutory damages, but not both. See 17 U.S.C. § 504(a) (1988); 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.01[B], at 14-7 (1994) (noting that the 1976 Act does not follow case law under the 1909 Act which allowed recovery of both). See generally Priscilla Ferch, Note, *Statutory Damages Under the Copyright Act of 1976*, 15 LOY. U. CHI. L.J. 485 (1984) (tracing development of the statutory damages provision and its general purposes). Statutory damages allow a plaintiff to receive an amount which the court determines to be fair in lieu of an award of actual damages. Plaintiffs can choose to recover statutory damages regardless of whether proof exists as to the actual damages suffered. NIMMER, *supra*, § 14.04[A], at 14-48. Oftentimes, plaintiffs elect statutory damages because actual damages are difficult to prove. See, e.g., *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850-51 (11th Cir. 1990) (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231-33 (1952) (discussing the 1909 Act)); *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 670 F. Supp. 1133, 1139-40 (E.D.N.Y. 1987); *Lauratex Textile Corp. v. Allton Knitting Mills Inc.*, 519 F. Supp. 730, 732-33 (S.D.N.Y. 1981) (citing *Russel v. Pierce*, 612 F.2d 1123 (9th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980)).

This Note does not reach a conclusion as to whether a different rule regarding the recovery of prejudgment interest should be applicable when plaintiffs elect to recover statutory damages. Under the 1976 Act, courts have not analyzed this issue in any great detail. See *Broadcast Music, Inc. v. Nortel Grill, Inc.*, No. CIV-89-1278E, 1991 WL 172079, at *2 (W.D.N.Y. Aug. 27, 1991) (distinguishing leading cases as involving claims for actual damages and holding that absent proof of "inadequate compensation" awards of prejudgment interest are not necessary under the statutory damages provision of the 1976 Act); *Paramount Pictures Corp. v. Metro Program Network, Inc.*, No. C89-0013, 1991 WL 348168, at *12 (N.D. Iowa Apr. 8, 1991) (holding prejudgment interest recoverable under the statutory damages provision of the 1976 Act but relying upon two decisions in which prejudgment interest was added to awards of actual damages); *Dumas v. Dagl*, No. 88 CIV. 2293 (LBS), 1990 WL 258343, at *6-*7 (S.D.N.Y. May 22, 1990) (Sand, J.) (holding prejudgment interest available under the 1976 Act and allowing plaintiff to elect either actual or statutory damages); see also *Davis v. E.I. DuPont de Nemours & Co.*, 257 F. Supp. 729, 730 (S.D.N.Y. 1966) (declining to award prejudgment interest

under the 1909 Act's statutory damages provision in part because such awards are "more speculative" than awards of actual damages).

Various courts have addressed whether prejudgment interest is available under other Acts in which courts can award statutory damages. These decisions, however, are of varying degrees of relevance. First, and perhaps most importantly, the purposes served by such awards vary from Act to Act. Second, as a purely structural matter, under some of these Acts statutory damages can be awarded in addition to actual damages, unlike under the 1976 Act.

For example, under an early version of the Fair Labor Standards Act ("FLSA"), the United States Supreme Court held that prevailing plaintiffs could not recover prejudgment interest. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945). Pursuant to the version of the FLSA then in effect, prevailing plaintiffs recovered both unpaid wages and "liquidated" damages. *Id.* at 699 n.1. The Court reasoned that the provision for liquidated damages served as compensation for delay and that an additional award of prejudgment interest was therefore unnecessary. See *id.* at 715. This case was distinguished by the United States Court of Appeals for the Fifth Circuit in *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986). In *Montelongo*, the plaintiff brought suit under the Farm Labor Contractor Registration Act ("FLCRA"). The court distinguished *Brooklyn Savings* on the ground that, under the FLCRA, plaintiffs could choose to recover either actual or liquidated damages, unlike the FLSA where plaintiffs recovered both liquidated and actual damages. See *id.* at 1354 & n.22. Nonetheless, the *Montelongo* court held that prejudgment interest was not available under the liquidated damages provision of the FLCRA because such awards are not related to the actual losses suffered. See *id.* at 1354. The court also noted that had the plaintiff proven actual damages, an award of prejudgment interest would have been appropriate. *Id.*

Similarly, the Seventh Circuit Court of Appeals held that prejudgment interest was not recoverable under the statutory damages provision of the Truth in Lending Act ("TILA"). See *Marshall v. Security State Bank (In re Marshall)*, 970 F.2d 383, 386 (7th Cir. 1992). Under the TILA, plaintiffs can recover either actual and statutory damages or statutory damages. See *Marshall v. Security State Bank (In re Marshall)*, 121 B.R. 814, 821 (Bankr. C.D. Ill. 1990) (citation omitted), *aff'd*, 132 B.R. 904 (C.D. Ill. 1991), *aff'd*, 970 F.2d 383 (7th Cir. 1992). In *Marshall*, the plaintiff recovered only statutory damages. The bankruptcy judge characterized such an award as a penalty and declined to award prejudgment interest. See *id.* at 821-22. The district court agreed, *Marshall*, 132 B.R. at 907-08, and the Seventh Circuit affirmed on these grounds. *Marshall*, 970 F.2d at 384. The Seventh Circuit added that even if the damages were characterized as liquidated, rather than a penalty, plaintiff could not recover prejudgment interest. See *id.* at 385-86. The court quoted from, and agreed with, the comments of the bankruptcy judge: "[W]here you have an arbitrary establishment of damages that has no relationship to what the actual damages might be . . . you should [not] tack on prejudgment interest" *Id.* at 386 (alteration in original) (citation omitted).

Finally, a number of circuit courts have addressed whether prejudgment interest is recoverable under the liquidated damages provision of the Age Discrimination in Employment Act ("ADEA"). Pursuant to the ADEA, plaintiffs can recover lost wages and, if defendant has acted willfully, liquidated damages. See 29 U.S.C. § 626(b) (1988). Because prevailing ADEA plaintiffs can only recover liquidated damages if they recover

The Act of 1976, like its predecessor, the Copyright Act of 1909,⁷ does not address the availability of prejudgment interest or even mention the word "interest."⁸ However, the United States

actual damages, these cases may be of limited utility in analyzing cases under the 1976 Act where plaintiffs can recover either actual or statutory damages, but not both. Nonetheless, these cases may be of some use insofar as they address the general principles underlying awards of prejudgment interest and statutory damages. The circuit courts are split on whether prevailing ADEA plaintiffs can recover prejudgment interest in addition to recovering lost wages and liquidated damages. Compare *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 282 (2d Cir. 1987) (characterizing the ADEA's liquidated damage provision as a penalty and holding that prejudgment interest therefore serves a different purpose and is recoverable) and *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (same) and *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983) (same), *aff'd on other grounds*, 472 U.S. 400 (1985) with *Powers v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990) (characterizing the ADEA's liquidated damage provision as compensatory in nature and holding that prejudgment interest therefore serves the same function and is not recoverable) and *Hamilton v. 1st Source Bank*, 895 F.2d 159, 166 (4th Cir.) (same), *aff'd in part and rev'd on other grounds*, 928 F.2d 86 (4th Cir. 1990) (en banc) and *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1335-37 (7th Cir. 1987) (same), *vacated on other grounds*, 486 U.S. 1020 (1988) and *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1479-80 (10th Cir.) (same), *cert. denied*, 469 U.S. 874 (1984).

6. This Note does not address many issues related to the availability of prejudgment interest under the 1976 Act. For example, this Note does not address, assuming prejudgment interest is granted, the rate at which it should be calculated. See, e.g., *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436-37 (7th Cir. 1989) (Posner, J.) (analyzing this issue and recommending the prime rate); *Frank v. Relin*, 851 F. Supp. 87, 91 (W.D.N.Y. 1994) (collecting cases addressing this issue). Nor does this Note suggest the criteria pursuant to which a court, in its discretion, may award prejudgment interest. See *Blau v. Lehman*, 368 U.S. 403, 414 (1962) (indicating that whether to award prejudgment interest rests with the discretion of the trial court); *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352 (1939) (prejudgment interest is not recoverable according to a "rigid theory of compensation" but rather is given in response to "considerations of fairness") (citations omitted); *infra* note 201 (addressing briefly this issue); see also *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989) (providing a non-exclusive list of factors that courts consider in determining whether to award prejudgment interest) (citations omitted).

7. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (superseded 1978) [hereinafter Act of 1909 or 1909 Act]. Although the 1976 Act supersedes the 1909 Act, the provisions of the 1909 Act still control in cases where the infringement took place before January 1, 1978. See NIMMER, *supra* note 5, § 1.01[C], at 1-44.23 (footnotes omitted). For example, one of the leading cases discussed in this Note was decided in 1989 but involved the provisions of the 1909 Act. See *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545 (9th Cir. 1989) (for further discussion of this case see *infra* notes 93-111 and accompanying text), *cert. denied*, 494 U.S. 1017 (1990).

8. See *infra* notes 78-82 and accompanying text.

Supreme Court, in *Rodgers v. United States*,⁹ held that statutory silence on the availability of prejudgment interest does not per se prohibit such awards.¹⁰ The Court held that the general purposes behind a statutory scheme, and the relative equities involved in a given case, should be examined to determine whether prejudgment interest is available.¹¹ Thus, when a statute is silent on the availability of prejudgment interest, a court must analyze two distinct issues before concluding whether a particular plaintiff is entitled to prejudgment interest. First, whether the general purposes Congress outlined in passing a given statute are consistent with awards of prejudgment interest. Second, assuming the answer to the first question is yes, whether the facts of a particular case warrant such an award.¹²

Courts are split on whether prejudgment interest is available under the 1976 Act.¹³ Some courts have held that it should be available,¹⁴ while others have held that as a rule it should not,¹⁵ and still others have sidestepped the issue by ruling that on the facts of a given case it should not be awarded.¹⁶ Unfortunately, few of the decisions discussed the issue in any great detail. To make matters

9. 332 U.S. 371 (1947) (for further discussion of this case see *infra* notes 48-52 and accompanying text).

10. See *id.* at 373.

11. See *id.*

12. See, e.g., *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1288 (5th Cir. 1994) (drawing this distinction) (citations omitted), *cert. denied*, 115 S. Ct. 933 (1995). This Note only addresses the first step of the analysis, whether the Act of 1976 permits courts to award prejudgment interest on awards of actual damages. For cases which address the second step of the analysis, see *supra* note 6.

13. See generally 1 NEIL BOORSTYN, BOORSTYN ON COPYRIGHT § 13.04, at 13-9 to 13-10 (2d ed. 1994) (collecting and analyzing some of the cases addressed in this Note); NIMMER, *supra* note 5, § 14.02[B], at 14-21 to 14-24 (same); Alois Valerian Gross, Annotation, *Interest on Awards of Damages and Profits for Federal Copyright Infringement*, 91 A.L.R. FED. 839 (1989) (same); David Goldberg & Robert J. Bernstein, *Damages, Attorneys' Fees and Prejudgment Interest*, N.Y.L.J., July 19, 1991, at 3 (same).

14. See *infra* notes 138-163 and accompanying text.

15. See *infra* notes 116-137 and accompanying text.

16. See *infra* note 115 and accompanying text. These decisions, while limiting their precedential value by restricting their holdings to the facts of a given case, very often have the practical effect of establishing a presumption against awards of prejudgment interest. To make matters more confusing, sometimes the decisions contain language which reflects both a desire to limit their holdings to the facts of a case and to establish a per se rule. See *infra* notes 116-131 and accompanying text.

more confusing, cases decided under the 1909 Act are frequently used for support in cases which uphold awards of prejudgment interest under the 1976 Act.¹⁷

Part I of this Note explores the historical development of prejudgment interest as a theory of damages and the leading United States Supreme Court cases on the subject of prejudgment interest. Part II, after reviewing the remedial provisions and legislative histories of the 1976 and 1909 Acts, surveys the wide range of appellate and district court decisions regarding prejudgment interest under both Acts. Part III analyzes these conflicting decisions in light of the legislative history of the 1976 Act, the general principles underlying awards of prejudgment interest and Supreme Court precedent. Part III also addresses whether the availability of both profits and damages under the 1976 Act precludes the need for awards of prejudgment interest. The Note concludes that the 1976 Act permits courts to award prejudgment interest.

I. GENERAL BACKGROUND

A. *A Brief History of Prejudgment Interest*

In early agrarian economies, interest, in any form, was banned by the laws of usury.¹⁸ As a result, prejudgment interest was

17. See *infra* notes 142, 149, 153 and accompanying text. This is also true for decisions that have denied awards of prejudgment interest under the 1976 Act. See *infra* notes 124-125, 135, 137 and accompanying text. Further complicating matters, these decisions occasionally cite the earlier 1909 Act cases without mentioning that they were decided under a different statutory scheme. Professor Nimmer has criticized the practice of relying on decisions decided under the 1909 Act for support in determining whether prejudgment interest is available under the 1976 Act. See NIMMER, *supra* note 5, § 14.02[B], at 14-23 to 14-24. Some cases, however, distinguish between the two Acts. See, e.g., *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir. 1994); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, No. 91-56248, 1993 WL 39269, at *8 (9th Cir. Feb. 17, 1993), *vacated in part on other grounds*, 24 F.3d 1088 (9th Cir.) (en banc), *cert. denied*, 115 S. Ct. 512 (1994); *Love v. Kwitny*, 772 F. Supp. 1367, 1373 (S.D.N.Y. 1991) (Mukasey, J.), *aff'd without op.*, 963 F.2d 1521 (2d Cir.), *cert. denied*, 113 S. Ct. 181 (1992).

18. Definitions of usury have varied over time. In these early times, it referred to the absolute prohibition on charging interest for the lending of money. Today, with the rejection of such an absolute prohibition, it has come to refer to laws which ban the charging of undue interest. See David J. Gerber, *Prometheus Born: The High Middle*

viewed as an inappropriate measure of damages.¹⁹ Over time, economies shifted from a focus on agriculture to systems in which merchants and industries played a more significant role. Along with this shift in economic systems came changes in the ways people viewed the charging of interest. Overall, "[a] practice which was oppressive and extortionate when applied to the poor peasant borrower was helpful and stimulating to trade when applied to the merchant seeking to finance the sale of his wares abroad."²⁰ This shift in attitudes led to the repeal of usury laws, which in turn paved the way for laws allowing prevailing plaintiffs to recover prejudgment interest.²¹

Ages and the Relationship Between Law and Economic Conduct, 38 ST. LOUIS U. L.J. 673, 704 (1991); see also *Marshall v. Beeler*, 178 P. 245, 246-47 (Kan. 1919) (tracing the history of usury laws); 8 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 100, 101-02 (1926) (discussing the early English laws against usury).

19. See CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 51, at 206-08 (1935) (this chapter of McCormick's book was first printed in 9 N.C. L. REV. 237 (1930-1931)). Dean McCormick observed:

In a primitive agricultural society, the borrowers of money are chiefly those who are weak and necessitous and thus are exposed to the over-reaching of the shrewd and unscrupulous. . . . Since the needy were the only borrowers, the practice of "usury"—receiving any recompense for money lent—was condemned outright. Thus Plato and Aristotle in Greece regarded lending on interest as unworthy, and Moses invoked the sanction of religion against the practice. . . . The Christian Church zealously espoused this moral concept, and throughout the medieval period the canon law absolutely forbade the receipt by Christians of recompense for the lending of money.

Id. § 51, at 207 (footnotes omitted); see also DOBBS, *supra* note 1, § 3.5, at 165 (noting the link between the early prohibition on prejudgment interest and usury laws); HOLDSWORTH, *supra* note 18, at 101 ("And it is clear that when trade was in its infancy, when, therefore, there was little opportunity for profitable investment, the relation of lender and borrower must be very strictly supervised. For, in such a state of society, borrowers of money were more often than not either the extravagant or the needy.").

20. MCCORMICK, *supra* note 19, § 51, at 207. For example, even under early Roman law, "while recompense for the mere lending is 'usury,' yet, if a loan be made gratuitously but is not repaid promptly according to the agreement, then a recompense may properly be exacted for the lender's losses actually suffered or gains prevented, by the borrower's default in complying with his promise." *Id.* (citation omitted); see also HOLDSWORTH, *supra* note 18, at 103 (recognizing that with the growth of trade, payments of interest under certain circumstances became "advantageous"); Gerber, *supra* note 18, at 704-07 (discussing the changes in the laws against usury in relation to the development of economic systems).

21. See MCCORMICK, *supra* note 19, § 51, at 208 (discussing the British Parliament's

In this country, where the mercantile influence was stronger from the start, courts have long recognized the desirability of awards of prejudgment interest.²² Traditionally, many American courts have distinguished between liquidated and unliquidated damages to determine whether such awards were appropriate.²³ The courts allowed awards of prejudgment interest in liquidated damage cases, and declined to award it in unliquidated cases. Courts "seemed to feel that it would be unfair to award interest on sums due from the defendant if he could not ascertain what those sums were."²⁴ In contrast, when those sums were liquidated, awards of prejudgment interest were seen as an appropriate means of penalizing the defendant for not paying what was owed.²⁵

There was, however, growing dissatisfaction with the distinction

repeal of its usury laws in 1854) (citation omitted); *see also* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 283-291, at 553-62 (9th ed. 1920) (discussing the history of prejudgment interest in the English courts).

22. *See* MCCORMICK, *supra* note 19, § 51, at 210 (citing *Reid v. Rensselaer Glass Factory*, 3 Cow. 393 (N.Y. 1824)). Other commentators have reached a similar conclusion:

In the American courts interest is allowed as damages more liberally than in England. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal

SEDGWICK, *supra* note 21, § 292, at 562.

23. *See* SEDGWICK, *supra* note 21, § 299, at 569; Rothschild, *supra* note 2, at 195-99; Williams, *supra* note 2, at 521-23. A liquidated demand is an amount that "has been ascertained or settled by agreement of the parties, or otherwise[] . . . is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in possession or knowledge of party to be charged." BLACK'S LAW DICTIONARY 930 (6th ed. 1990) (citations omitted). The most common example is an action to recover a debt owed pursuant to contract. In contrast, an unliquidated demand exists "when the amount of the damages cannot be computed except on conflicting evidence, inferences and interpretations." *Id.* at 1537 (citation omitted). A typical example is an action for battery or wrongful death. In spite of these delineations, there was often considerable debate on whether an amount was liquidated. *See* SEDGWICK, *supra* note 21, § 299, at 569-71; Williams, *supra* note 2, at 523-25.

24. DOBBS, *supra* note 1, § 3.5, at 173.

25. *See* Williams, *supra* note 2, at 522; Stanford Note, *supra* note 2, at 107; *see also* *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 n.10 (1983) (discussing reasons for rejecting this rationale under modern prejudgment interest theory).

between liquidated and unliquidated damages.²⁶ As a result, many jurisdictions abandoned it.²⁷ At the same time, the rationale for awarding prejudgment interest changed. Courts justified awards on two related theories. The loss theory recognized that "the inherent income-producing ability of money cannot be separated from the money itself; hence, denial of interest would be denial of an inexorable economic fact."²⁸ The other rationale, the unjust enrichment theory, recognized that

[t]o the extent defendant has had the free use of the income-producing ability of plaintiff's money without having to pay for it, he has been unjustly enriched. To divest defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.²⁹

With the breakdown and rejection of the distinction between

26. See, e.g., *DOBBS*, *supra* note 1, § 3.5, at 173 ("It is no more unfair to the defendant to hold him for interest on a sum he could not ascertain in advance than it is to hold him for the unascertainable sum itself . . ."); *SEDGWICK*, *supra* note 21, § 300, at 571 ("There is no reason why the damages to be paid by the defendant should be mitigated or reduced by the circumstances that his tort or breach of contract was of such an aggravated or cunningly perfidious character as to make a liquidation of the claim against him difficult."). For a rather famous and elucidating example of a court rejecting the early justifications for awards of prejudgment interest see *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 592-95 (2d Cir. 1961) (prejudgment interest recoverable under the Death on the High Seas Act), *cert. denied*, 368 U.S. 989 (1962).

27. See generally C.T. Drechsler, Annotation, *Interest on Damages for Period Before Judgment for Injury to, or Detention, Loss, or Destruction of Property*, 36 A.L.R.2d 337 (1954). Nonetheless, it is an overstatement to suggest that the distinction is of no importance under contemporary prejudgment interest theory. See Randall Kennedy, Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 YALE L.J. 297, 302 & n.29 (1981).

28. Stanford Note, *supra* note 2, at 109; see *West Va. v. United States*, 479 U.S. 305, 310-11 n.2 (1987) (prejudgment interest compensates plaintiffs for "the loss of the use of money due as damages . . . , thereby achieving full compensation" (citing *Rothschild*, *supra* note 2)).

29. Stanford Note, *supra* note 2, at 109; see *General Motors*, 461 U.S. at 655-56 n.10 (denying prejudgment interest may grant a windfall to defendant); *Miller v. Robertson*, 266 U.S. 243, 257-58 (1924) ("One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made."); see also *Waite v. United States*, 282 U.S. 508, 509 (1931) (prejudgment interest necessary for "entire" compensation).

liquidated and unliquidated damages, courts established more liberal rules for awarding prejudgment interest. Some courts looked to whether the claim was "ascertainable."³⁰ A claim is deemed "ascertainable" when it can be calculated with reference to some recognized standard.³¹ A further indication of this liberal trend is the adoption by many states of statutes or court rules which make awards of prejudgment interest mandatory under certain circumstances.³²

In sum, prejudgment interest was not considered an element of proper recovery during the time that usury laws banned the charging of interest. With the repeal of usury laws came the recognition of prejudgment interest as an appropriate remedy. In this country, courts have long recognized the importance of awards of prejudgment interest. The traditional standard for determining whether awards of prejudgment interest are appropriate, the distinction between liquidated and unliquidated damages, has been abandoned by many jurisdictions. The rejection of this distinction has been fueled by the growing recognition that money has an inherent use value. Overall, there has been a general trend towards a greater willingness to award prejudgment interest.³³

30. See DOBBS, *supra* note 1, § 3.5, at 166-67 (observing that some claims which are unliquidated are nonetheless ascertainable and that courts treat such claims as liquidated); MCCORMICK, *supra* note 19, §§ 54-57a, at 213-29 (analyzing the different rules and dividing them into the following categories: liquidated, unliquidated but ascertainable, unliquidated but pecuniary in nature, and injuries to interests of personality [e.g., pain and suffering, etc.]); SEDGWICK, *supra* note 21, § 313, at 616-19 (discussing the development of this rule); WILLIAMS, *supra* note 2, at 521-23 (arguing that the shift to the ascertainable standard conformed to the liquidated-unliquidated rule because when damages are capable of being ascertained "the defendant knows how much he owes, and in these circumstances his failure to pay makes a penalty proper").

31. See Kennedy, *supra* note 27, at 302; WILLIAMS, *supra* note 2, at 522.

32. See Rothschild, *supra* note 2, at 209 & nn.97, 98. In contrast, in earlier times and in many jurisdictions, the jury determined whether to award prejudgment interest. See MCCORMICK, *supra* note 19, § 51, at 206; SEDGWICK, *supra* note 21, § 295, at 564. This modern trend, like others in the prejudgment interest area, has been fueled by the growing recognition "that money has a 'use value,' and interest, reflecting this 'use' by the defendant, is a legitimate element in providing the plaintiff with full compensation." WILLIAMS, *supra* note 2, at 521.

33. See DOBBS, *supra* note 1, § 3.5, at 165; Kennedy, *supra* note 27, at 299 & n.11.

B. *Leading Supreme Court Cases*

Although the United States Supreme Court has not addressed the availability of prejudgment interest under either the 1909 or 1976 Acts, it has discussed prejudgment interest in a wide variety of other contexts. These decisions in many respects reflect the historical development of prejudgment interest as a theory of recovery. In addition, they provide the general framework for determining whether prejudgment interest should be available under the 1976 Act.

As early as 1924, the United States Supreme Court, in *Miller v. Robertson*,³⁴ recognized the need for awards of prejudgment interest in cases involving unliquidated damages.³⁵ In spite of the historical prohibition against awards of prejudgment interest on unliquidated claims,³⁶ the Court upheld such an award and reasoned that "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."³⁷ The Court recognized that "[o]ne who has had the use of money owing to another justly may be required to pay interest from the time the payment should

34. 266 U.S. 243 (1924). This case involved a suit under the Trading with the Enemy Act ("TEA"). Plaintiff, Mr. Robertson, was the assignee of Mammoth Copper Mining Company ("seller") in a contract with Beer, Sondheimer & Co. ("buyer") for the sale of zinc ore. Plaintiff, as assignee of the contract, brought suit for breach of contract. *Id.* at 245. Buyer, however, was owned by citizens of Germany, and pursuant to the TEA, all of its assets were seized by the United States government. *Id.* The defendant in this case was the Alien Property Custodian, the Treasurer of the United States. Under the terms of the TEA, the property seized by the Treasurer could be used to pay off any "debt" owed to a person who was not an enemy or ally of an enemy. *Id.* at 248. Both the district and circuit courts ruled in favor of plaintiff and defendant appealed to the Supreme Court. The Court reasoned that the TEA should be "liberally construed" and held that the breach of contract was a debt within the meaning of the TEA. *Id.* The Court also held that: (1) the contract did not fail for lack of consideration, *id.* at 251-52; (2) buyer was not excused from performance by seller's alleged failure to comply with the terms of the contract, *id.* at 253-54; and (3) this contract was not unenforceable due to the existence of an earlier agreement between buyer and a parent company of seller. *Id.* at 255.

35. *Id.* at 259.

36. See *supra* notes 23-25 and accompanying text.

37. *Miller*, 266 U.S. at 258 (citations omitted).

have been made."³⁸

This recognition of the equitable nature of awards of prejudgment interest was again recognized by the Court in *Waite v. United States*.³⁹ In *Waite*, the Court allowed the plaintiff, in an action against the United States,⁴⁰ to recover "interest"⁴¹ under an Act for the unlicensed use of a patented invention.⁴² The Act did not specifically provide for such an award; rather, it provided for "'recovery of [plaintiff's] reasonable and entire compensation for such use."⁴³ The Court focused on the word "entire" and held that interest was necessary to fully compensate plaintiffs.⁴⁴

In 1941, the Court began to recognize that statutory silence on the availability of prejudgment interest should not result in a per se bar to its recovery. In a case brought by the United States government against the surety of a bond, the Court, in *Royal Indemnity Co. v. United States*,⁴⁵ held that "[i]n the absence of an applicable

38. *Id.* at 257-58.

39. 282 U.S. 508 (1931).

40. This case stands as an exception to a general rule, developed in a long line of Supreme Court cases not discussed in this Note, against awarding prejudgment interest to prevailing plaintiffs in suits against the United States. *See, e.g.,* *Library of Cong. v. Shaw*, 478 U.S. 310 (1986) (discussing the origins of this rule and applying it to Title VII); *see also* Kennedy, *supra* note 27 (tracing the history of this rule and arguing that it is no longer viable in light of modern prejudgment interest theory).

41. Unfortunately, the Court did not make clear whether its award of "interest" was for prejudgment or postjudgment interest. *See Waite*, 282 U.S. at 509. Nevertheless, subsequent Supreme Court cases have cited *Waite* as a case involving prejudgment interest. *See, e.g.,* *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n.10 (1983).

42. *See Waite*, 282 U.S. at 508-09 (citation omitted).

43. *Id.* at 509 (citation omitted).

44. *Id.*

45. 313 U.S. 289 (1941). The case began when a taxpayer filed a claim for abatement of income tax along with a surety bond in the amount of \$38,000. *Id.* at 292-93. The taxpayer allegedly owed \$29,128 in unpaid taxes. *Id.* at 292. A tax collector granted the abatement in part, finding that taxpayer owed \$8,223.38 in taxes and \$4,169.07 in interest on this unpaid amount. *Id.* at 293. Petitioner, holder of the surety bond, paid the collector the \$8,223.38, but not the interest. The collector accepted this payment, returned the bond to petitioner and stated that all liability on it was terminated. *Id.* at 292-93. The district court held that the collector did not have the authority to release the bond and awarded judgment to the United States for the unpaid interest up to the date of the collector's decision, \$4,169.07, but not for the time subsequent to this. *Id.* at 293. The district court reasoned that granting such an award would violate the general rule prohibiting

federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due."⁴⁶ The Court recognized that since this case involved the failure to pay a contractually owed debt, it was reasonable to charge the petitioner with the full amount for the delay because the petitioner's use of the money had wrongfully deprived the United States of access to the funds.⁴⁷

Six years later, in *Rodgers v. United States*,⁴⁸ the Court reaffirmed the holding in *Royal Indemnity*.⁴⁹ In *Rodgers*, the Court again recognized that when an Act does not address the availability of prejudgment interest, an award of it is not per se inappropriate.⁵⁰ The Court held that where the language of a statute does not prohibit such an award, whether interest can be awarded is to be determined "by an appraisal of the congressional purpose in imposing [statutory obligations] and in the light of general principles deemed relevant by the Court."⁵¹ Under the specific statutory scheme be-

awards of interest on interest and that it would be inequitable due to the collectors release of the bond and the government's delay in bringing suit. *Id.* at 295. On appeal, the United States Court of Appeals for the Second Circuit held that under New York law the government was entitled to interest during the period subsequent to the release of the bond. *Id.* at 293. Because that decision was in conflict with a decision of the United States Court of Appeals for the Third Circuit, the Court granted certiorari. *Id.*

46. *Id.* at 296 (citations omitted).

47. *See id.* at 296-97.

48. 332 U.S. 371 (1947). Petitioner in this case produced and sold more cotton than the Agricultural Adjustment Act permitted and the United States brought suit. After rendering a judgment against petitioner, the district court awarded the United States prejudgment interest. *Id.* at 372. The United States Court of Appeals for the Sixth Circuit affirmed, creating a conflict with the Fifth Circuit Court of Appeals. The Supreme Court granted certiorari to resolve this conflict. *Id.* at 372-73.

49. *Id.* at 373.

50. *Id.* (citing *Billings v. United States*, 232 U.S. 261, 284-88 (1914)).

51. *Id.* (citing *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343 (1939)). These principles, according to the Court, have included:

[T]he relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

fore the Court in *Rodgers*, the Court held that the money owed by petitioner was equivalent to a criminal penalty and that therefore the plaintiff was not entitled to prejudgment interest.⁵²

Although not a decision involving a silent statute, the Court in *General Motors Corp. v. Devex Corp.*⁵³ addressed the principles underlying discretionary awards of prejudgment interest. The case arose under the Patent Act of 1946, which explicitly provided for an award of prejudgment interest.⁵⁴ In an attempt to provide guidelines for determining when such an award should be given,⁵⁵ the Court held that under this Act "prejudgment interest should ordinarily be awarded. In the typical case an award of prejudgment interest is necessary to ensure that the patent owner is placed in as good a position as he would have been in had the infringer entered into a reasonable royalty agreement."⁵⁶ The Court also emphasized

Id. (citations omitted).

52. *Id.* at 374 (citing *Pierce v. United States*, 255 U.S. 398, 405-06 (1921)).

53. 461 U.S. 648 (1983). The suit involved a claim by Devex that General Motors had infringed Devex's patent for a lubricating process on automobile parts. After a rather lengthy procedural history, the district court awarded Devex \$8,813,945.50 in royalties and \$11,022,854.97 in prejudgment interest. *Id.* at 651. The Court granted certiorari "to consider the standard applicable to the award of prejudgment interest under [the Patent Act of 1946]." *Id.*

54. See 35 U.S.C. § 284 (1988) ("Upon finding for the claimant the court shall award the claimant damages . . . together with interest and costs as fixed by the court.").

55. Before the 1946 amendments to the Patent Act, the Patent Act was silent on whether courts could award prejudgment interest. See 35 U.S.C. § 70 (1940). Nonetheless, the Supreme Court, in *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 459 (1936), held that prevailing plaintiffs could recover prejudgment interest. See *infra* note 201. Prior to *General Motors*, the circuit courts were split on the issue of whether the 1946 version of the Act incorporated the *Duplate* standard and, assuming it did not, the circumstances under which prejudgment interest should be granted. See *General Motors*, 461 U.S. at 652 & n.7. The Court ultimately held that the Act did not incorporate the *Duplate* standard. *Id.* at 653.

56. *General Motors*, 461 U.S. at 655 (footnote omitted). In an important and interesting footnote to this reasoning, the Court commented upon the breakdown in the distinction between liquidated and unliquidated damages and the shifting rationales offered to support awards of prejudgment interest:

The traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents "delay damages" and should be awarded as a component of full compensation. A rule denying prejudgment interest not only undercompensates the patent owner but also may grant a windfall to the

that its holding did not require an award of prejudgment interest in every case, but rather, within the framework established by the Court, left the matter to the sound discretion of the trial court.⁵⁷

The principles discussed in *General Motors* were applied by the Court to a silent statutory scheme in *West Virginia v. United States*.⁵⁸ The Court reaffirmed the holding of *Royal Indemnity*⁵⁹ and held that the United States was entitled to recover prejudgment interest against the state of West Virginia for breach of contract.⁶⁰ The Court reasoned that “[p]rejudgment interest is an element of complete compensation.”⁶¹ Furthermore, “[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.”⁶²

Shortly after the decision in *West Virginia*, the Court appeared to retreat from these broad equitable principles. In *Monessen Southwestern Railway v. Morgan*⁶³ the Court declined to allow a

infringer and create an incentive to prolong litigation. There is no reason why an infringer should stand in a better position than a party who agrees to pay a royalty and then fails to pay because of financial difficulties.

Id. at 655-56 n.10 (citations omitted).

57. *Id.* at 656-57. The Court noted that it may, for example, be inappropriate to grant an award of prejudgment interest when the plaintiff is responsible for any delays in the trial. *Id.*

58. 479 U.S. 305 (1987). The case arose after massive flooding during 1972 caused the President to declare West Virginia a major disaster area. *Id.* at 306-07. Pursuant to this status, the State became eligible for federal assistance under the Disaster Relief Act of 1970 (“DRA”). *Id.* at 307. Under the DRA, the State was still responsible for the costs associated with preparing sites for temporary housing. *Id.* At West Virginia’s request, however, the Army Corps of Engineers prepared such sites and subsequently charged the State for this service. After the State failed to make any payments, the United States brought suit. *See id.* at 307.

59. *See id.* at 308-09.

60. *Id.* at 307-08, 312.

61. *Id.* at 310 (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 & n.10 (1983)).

62. *Id.* at 310 n.2 (citing *Rothschild*, *supra* note 2).

63. 486 U.S. 330 (1988). Plaintiff was injured while working as a brakeman and conductor for a railroad. Plaintiff brought suit under the Federal Employers’ Liability Act (“FELA”) in Pennsylvania state court. *Id.* at 332. After the jury found for the plaintiff, the trial judge, pursuant to state law, awarded the plaintiff prejudgment interest. The

prevailing plaintiff to recover prejudgment interest under the Federal Employers' Liability Act ("FELA").⁶⁴ The Court began by observing that Congressional silence under FELA as to the availability of prejudgment interest was not decisive.⁶⁵ Nonetheless, the

Pennsylvania Supreme Court affirmed. *Id.* at 332-33. Prior to determining whether FELA granted prevailing plaintiffs the right to an award of prejudgment interest, a unanimous United States Supreme Court held that federal common law, not state statutory law, controlled the issue of whether prejudgment interest was available. *Id.* at 335, 342 (Blackmun, J., concurring in part and dissenting in part), 350 (O'Connor, J., concurring in part and dissenting in part). See *infra* part III.C for a discussion of *Monessen's* applicability to the availability of prejudgment interest under the 1976 Act.

64. *Monessen*, 486 U.S. at 336-39.

65. *Id.* at 336-37 (citing *Rodgers v. United States*, 332 U.S. 371, 373 (1947)). In addition to recognizing this general principle, the Court noted a significant failed attempt to amend the federal postjudgment interest statute. As part of the Federal Courts Improvement Act of 1982, Congress considered an amendment to 28 U.S.C. § 1961 (1988) which would have authorized the federal courts to award prejudgment interest. In the Committee Report which accompanied the legislation Congress explicitly stated:

There are presently no generally applicable guidelines concerning the award of prejudgment interest in Federal courts. Yet such interest may be essential in order to compensate the plaintiff or to avoid unjust enrichment of the defendant. . . . The bill provides that, where a defendant knew of his liability, interest be awarded for the prejudgment period at a rate that is keyed to the prime interest rate, where this is necessary to compensate the plaintiff. The imposition of such interest would be left to the discretion of the district judge in each case.

S. REP. NO. 275, 97th Cong., 2d Sess. 11-12 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 21-22. This provision was not included in the final version of the Act. See Pub. L. 97-164, 96 Stat. 25 (1982). During the debate immediately preceding passage of the Act, a floor amendment was passed which eliminated the provision. The Senator responsible for the amendment explained:

In response to the concerns expressed by OMB [Office of Management and Budget] and on further examination by [judiciary] committee staff, it seemed that this matter should be given more thorough attention before enactment into law.

Thus, the entire prejudgment interest provision has been stricken by this amendment. It is this Senator's intention that this action be done without prejudice on the merits of the issue. It is anticipated that the subcommittee will consider the question in the coming months so as to be able to explore all facets of the matter prior to any further legislative activity.

127 CONG. REC. 29,865 (1981) (statement of Sen. Grassley). Courts which have recognized this failed amendment have not found it dispositive in determining whether prejudgment interest is available under a silent statutory scheme. See, e.g., *Monessen*, 486 U.S. at 339 n.8; *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 n.7 (3d Cir. 1987); *Carver v. Consolidated Rail Corp.*, 600 F. Supp. 125, 126 n.2 (E.D. Pa. 1984).

Court held that this silence, over the course of some eighty years, was an indication that Congress did not intend for prevailing FELA plaintiffs to be able to recover prejudgment interest.⁶⁶ More specifically, the Court recognized that in 1908, when FELA was first passed, there was a "well-established" common law tradition of not granting prejudgment interest in personal injury cases.⁶⁷ Although Congress had amended FELA to dispense with other common law doctrines from that era, it had not done so with the rule against granting awards of prejudgment interest in personal injury cases.⁶⁸ Moreover, according to the Court, "with virtual unanimity" lower courts had held that prejudgment interest was not available under FELA.⁶⁹ For these reasons the Court concluded that FELA plaintiffs cannot recover prejudgment interest.⁷⁰

Overall, the Court has long recognized the need for awards of prejudgment interest, even in cases involving unliquidated claims. In keeping with this liberal view, the Court has also held that a statute's silence on the availability of prejudgment interest does not create a per se bar to its recovery. In recent times, the Court has recognized the modern rationales offered to support awards of prejudgment interest and the broad equitable purposes served by such awards.

66. *Monessen*, 486 U.S. at 337-38.

67. *Id.* at 337.

68. *Id.* at 337-38. The Court noted that Congress amended FELA to prevent employers from being able to raise contributory negligence as a defense. *Id.* at 337. The Court recognized that this amendment was enacted "to provide liberal recovery for injured workers[.]" *Id.* (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958)). The Court also noted that Congress had amended FELA in 1910, 1939 and 1948. *Id.* at 338-39.

69. *Id.* at 338 (citations omitted).

70. *Id.* at 339. In response to Justice Blackmun's dissent, *see id.* at 345 (Blackmun, J., dissenting), the Court distinguished *General Motors* and *Waite*: "In none of those cases did the plaintiff seek prejudgment interest on a cause of action arising under a statute that, like the FELA, was enacted at a time when prejudgment interest was generally unavailable on similar causes of action arising under the common law." *Id.* at 339 n.9.

II. CIRCUIT AND DISTRICT COURT DECISIONS ANALYZING THE AVAILABILITY OF PREJUDGMENT INTEREST UNDER THE 1909 AND 1976 ACTS

Before discussing the conflicting decisions under the 1909 and 1976 Acts, it is helpful to understand the general monetary remedial provisions of the Acts. In addition, while the 1909 Act's legislative history does not discuss the issue in an illuminating manner, the 1976 Act's legislative history provides some general statements regarding the purposes served by the 1976 Act's remedial provisions.

A. 1909 Act Background

The first federal copyright statute was passed in 1790.⁷¹ By 1905, this early statute was no longer sufficient to cover the increasingly complex nature of copyrights. President Roosevelt understood the need for change when he stated, "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression . . . they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public."⁷² Four years later, the Act of 1909 was enacted into law.

Sections 101 and 116 of the 1909 Act form the major remedy provisions.⁷³ Section 101 addresses awards of damages and profits.⁷⁴ Courts are split on whether section 101 allows prevailing

71. See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790). Prior to passage of the 1909 Act, the Copyright Act of 1790 was amended twice. See Act of July 8, 1870, ch. 230, 16 Stat. 198 (1870); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831).

72. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 1 (1909) [hereinafter 1909 Report]. The Senate's report is a word-for-word adoption of the House Report. See S. REP. NO. 1108, 60th Cong., 2d Sess. (1909). For a further, and very detailed, discussion of the events leading up to the passage of the 1909 Act see Justice Frankfurter's opinion in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647-52 (1943).

73. See 17 U.S.C. §§ 101, 116 (1970).

74. Section 101(b) provides, in relevant part:

[T]he copyright proprietor [shall be entitled to] such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall

plaintiffs to recover both profits and damages, or only the greater of the two.⁷⁵ Section 116 provides for discretionary awards of attorneys' fees and mandatory awards of costs.⁷⁶ Neither the statute nor the legislative history addresses the issue of prejudgment interest.⁷⁷

B. 1976 Act Background

Under the 1976 Act, sections 504 and 505 provide the major provisions for monetary remedies. Section 504, resolving the dispute under the 1909 Act, allows prevailing plaintiffs to recover both actual damages and profits.⁷⁸ Section 505 permits discretionary awards of attorneys' fees and costs.⁷⁹ No mention is made of

be required to prove every element of cost which he claims

17 U.S.C. § 101(b) (1970).

75. For a discussion of this split see *infra* note 110.

76. Section 116 provides:

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

17 U.S.C. § 116 (1970).

77. See 17 U.S.C. §§ 101(b), 116 (1970); 1909 Report, *supra* note 72, at 15-16.

78. See 17 U.S.C. § 504(a)(1) (1988). 17 U.S.C. § 504(b) defines actual damages and profits as follows:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b) (1988). In the patent context, the distinction between awards of actual damages and profits has been described as follows: "[W]hat the infringer makes is profits; what the owner of the patent loses by such infringement is damages." *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 451 (1936) (internal quotation marks and citation omitted).

79. Section 505 provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505 (1988). An analysis of whether prejudgment interest is recoverable

prejudgment interest anywhere in the 1976 Act. Nor does the legislative history of the 1976 Act make any direct reference to interest.⁸⁰ The legislative history of section 504 states that this section has two basic aims:

(1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.⁸¹

In addition, the legislative history indicates the different purposes served by awards of damages and profits. "Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act."⁸²

C. Prejudgment Interest Not Recoverable Under the Copyright Act of 1909

In *Baldwin Cooke Co. v. Keith Clark, Inc.*,⁸³ the United States District Court for the Northern District of Illinois denied a prevailing plaintiff an award of prejudgment interest and held that the 1909 Act did not support such awards.⁸⁴ The court did, however,

under the 1976 Act need not address this section because, in addition to obviously not being a component of attorneys' fees, prejudgment interest "is considered as damages, not a component of 'costs.' Indeed, the term 'costs' has never been understood to include any interest component." *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986) (citations omitted).

80. See H.R. REP NO. 1476, 94th Cong., 2d Sess. 161-63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5777-79 [hereinafter 1976 Report]; see also 5 ALAN LATMAN & JAMES F. LIGHTSTONE, *THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIAL LEADING TO THE COPYRIGHT ACT OF 1976* 163-225 (1984) (reprinting the twenty drafts of section 504, none of which mentioned prejudgment interest); *id.* at 227-44 (same for section 505).

81. 1976 Report, *supra* note 80, at 5777.

82. *Id.*

83. 420 F. Supp. 404 (N.D. Ill. 1976).

84. *Id.* at 409.

allow the plaintiff to recover both damages and profits,⁸⁵ in addition to attorneys' fees and costs.⁸⁶ The court recognized the absence of any language in the 1909 Act permitting an award of prejudgment interest and noted the presence of such language in the Patent Act. Having recognized this distinction, the court held that, even in cases of "flagrant" infringement, plaintiff's recovery of both profits and damages served as a sufficient deterrent and precluded the need for an award of prejudgment interest.⁸⁷

In an early decision by the United States District Court for the Southern District of New York, *Davis v. E.I. DuPont de Nemours & Co.*,⁸⁸ the court declined to grant a prevailing plaintiff prejudgment interest under the statutory damages provision of the 1909 Act.⁸⁹ The court recognized the United States Supreme Court's decision in *Rodgers*, but reasoned that in the absence of any precedent even addressing the issue, the court was not justified in granting such an award.⁹⁰ In addition, the court focused on the "speculative considerations" inherent in statutory damages.⁹¹ Finally, the court believed that plaintiff had been made whole by its award of counsel fees.⁹²

D. *Prejudgment Interest Recoverable Under the Copyright Act of 1909*

In *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*,⁹³ perhaps the leading and most frequently cited opinion addressing the availability of prejudgment interest under either of the Copyright Acts,

85. *Id.* at 405 (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952); *Gelles-Widmar Co. v. Milton Bradley Co.*, 132 U.S.P.Q. (BNA) 30 (N.D. Ill. 1961), *aff'd*, 313 F.2d 143 (7th Cir. 1963)). *But see infra* note 110 (discussing the split in authority regarding the availability of both damages and profits under the 1909 Act).

86. *Baldwin Cooke*, 420 F. Supp. at 408.

87. *Id.* at 409.

88. 257 F. Supp. 729 (S.D.N.Y. 1966).

89. *Id.* at 730.

90. *Id.* at 730 & n.2.

91. *Id.* at 730 (citation omitted).

92. *Id.* at 730-31.

93. 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990).

the court upheld an award of prejudgment interest under the 1909 Act.⁹⁴ The court began its analysis with the United States Supreme Court's decision in *Rodgers* and its holding that silence in a given statute is not a final indication of the legislature's intent with regard to prejudgment interest.⁹⁵ In determining whether prejudgment interest should be available, the *Frank Music* court indicated that the inquiry should focus on the "relative equities" of the case.⁹⁶ In this regard, the court further reasoned that "[p]rejudgment interest compensates the injured party for the loss of the use of money he would otherwise have had."⁹⁷

The defendants in *Frank Music* argued that the availability of prejudgment interest under the Patent Act, by the express terms of the statute,⁹⁸ in contrast to the absence of a similar provision in the 1909 Act, indicated that Congress did not intend to allow courts to award prejudgment interest under the 1909 Act.⁹⁹ The court, however, disagreed.¹⁰⁰ Prior to the amendments to the Patent Act which explicitly authorized courts to award prejudgment interest ("1946 Amendments"), the Patent Act was silent regarding the availability of prejudgment interest.¹⁰¹ Nonetheless, "prejudgment interest was generally available in patent infringement cases from the date damages were liquidated, and in exceptional cases from the date of infringement."¹⁰² Significantly, according to the court,

94. *Id.* at 1551.

95. *Id.* at 1550 (citing *Rodgers v. United States*, 332 U.S. 371 (1947)).

96. *Id.* (quoting *Rodgers*, 332 U.S. at 373).

97. *Id.* (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-56 (1983)).

98. Section 35 of the Patent Act provides, in relevant part:

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

35 U.S.C. § 284 (1988).

99. See *Frank Music*, 886 F.2d at 1550 (footnote and citation omitted).

100. See *id.* at 1550-51.

101. The patent laws in effect before the 1946 Amendments provided that "the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages[] the complainant has sustained thereby . . ." 35 U.S.C. § 70 (1940).

102. *Frank Music*, 886 F.2d at 1551 (citing *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 459 (1936); *Tilghman v. Proctor*, 125 U.S. 136, 160 (1888)).

the applicable language of the Patent Act prior to the 1946 Amendments was similar to the silent statutory provision of the 1909 Act.¹⁰³ With the defendant's argument thus disposed, the court held that Congressional silence under the 1909 Act was not dispositive and that "[j]ust as courts awarded prejudgment interest in order to provide adequate compensation to patent holders before the [1946 Amendments], this same remedy should be available to copyright owners for the same purpose."¹⁰⁴ The court was equally explicit that it did not intend this holding to extend necessarily to the 1976 Act.¹⁰⁵

In addressing the secondary issue of under what circumstances prejudgment interest should be awarded, the court held that prejudgment interest should "ordinarily" be awarded under the 1909 Act.¹⁰⁶ The court reasoned that because the 1909 Act only allows a plaintiff to recover the greater of defendant's profits or plaintiff's damages, the 1909 Act may not adequately compensate prevailing plaintiffs.¹⁰⁷ In an important footnote to this reasoning, the court observed that prior to the 1946 Amendments, patent plaintiffs could recover both profits and damages.¹⁰⁸ After the 1946 Amendments, Congress explicitly granted prevailing patent plaintiffs the right to recover prejudgment interest, but also eliminated recovery of profits.¹⁰⁹ Applying this reasoning to the 1909 Act, the *Frank Music* court concluded:

103. *Id.* at 1551 (footnotes omitted). Compare 35 U.S.C. § 70 (1940) ("[T]he complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages[] the complainant has sustained thereby . . .") with 17 U.S.C. § 101(b) (1970) (a prevailing plaintiff can recover "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement").

104. *Frank Music*, 886 F.2d at 1551 (footnote omitted) (citing *Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders.")).

105. *Id.* at 1551 n.8. The court also stated "that Congress's [sic] continuing silence on this issue in the 1976 Act [should not necessarily] be interpreted as an express disavowal of prejudgment interest. Ordinarily, Congress' silence is just that—silence." *Id.* (internal quotation marks and citations omitted).

106. *Id.* at 1552.

107. *Id.* (citations and footnote omitted).

108. *Id.* at 1552 n.9 (citation omitted).

109. *Id.* (citation omitted).

[T]he provision of generally available prejudgment interest as a quid pro quo for the unavailability of profits in the patent context suggests the suitability of making prejudgment interest generally available under the 1909 Act where the copyright holder is limited to recovering only profits or damages, but not both.¹¹⁰

The court also indicated that "this analogy should [not] be dispositive in determining whether and when prejudgment interest should be awarded under the 1976 Copyright Act"¹¹¹

In the only other circuit court to address this issue under the

110. *Id.* The *Frank Music* court's conclusion that the 1909 Act does not permit recovery of both profits and damages is not beyond dispute. See, e.g., *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194, 196 & nn.4, 5 (2d Cir. 1964) (collecting cases on both sides and concluding that both profits and damages can be recovered); *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 405 (N.D. Ill. 1976) (holding that both profits and damages, but not prejudgment interest, can be awarded) (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952)). But see *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1176 (9th Cir. 1977) (Sneed, J., concurring) (arguing that the Court's decision in *F.W. Woolworth* does not compel awards of both damages and profits). The source of this controversy is a contradiction between the language of the statute and the applicable legislative history. Compare 17 U.S.C. § 101(b) (1970) (a prevailing plaintiff may recover "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement") with 1909 House Report, *supra* note 72, at 15 (stating that this provision was intended to comport with the Patent Act and that "courts have usually construed [the Patent Act] to mean that the owner of the patent might have one or the other, whichever was the greater"). Thus, the *Frank Music* court's holding that the 1909 Act only permits a court to grant profits or damages, whichever is greater, is not without debate. Therefore, its reasoning that such a limitation was a quid pro quo for the general availability of prejudgment interest is likewise open to question. Nonetheless, as a general matter outside the context of the 1909 Act, the *Frank Music* court may have been correct that the absence of recovery for profits is an indication of the general availability of prejudgment interest. See *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983) (tracing the history of the various patent acts and suggesting that Congress may have reached this conclusion); *supra* notes 53-57 and accompanying text; *infra* notes 183-202 and accompanying text.

111. *Frank Music*, 886 F.2d at 1552 n.9. It should be recalled that the 1976 Act allows prevailing plaintiffs to recover both profits and damages. See 17 U.S.C. § 504(a)(1) (1988). Notably, in *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, No. 91-56248, 1993 WL 39269, at *8 (9th Cir. Feb. 17, 1993), *vacated in part on other grounds*, 24 F.3d 1088 (9th Cir.) (en banc), *cert. denied*, 115 S. Ct. 512 (1994), the Ninth Circuit expressly declined to extend the reasoning of *Frank Music* to the 1976 Act.

1909 Act, the United States Court of Appeals for the Second Circuit upheld a decision that included an award of prejudgment interest.¹¹² The court did so, however, without any discussion.¹¹³

In short, in *Baldwin Cooke* the court focused on two factors in holding that prejudgment interest is not available under the 1909 Act: (1) the availability of prejudgment interest under the current version of the Patent Act ("the 1946 Act") by the express terms of the statute; and (2) plaintiff's recovery of profits and damages. In contrast, the Ninth Circuit, in *Frank Music*, held that prevailing plaintiffs under the 1909 Act can recover only the greater of defendant's profits or damages. In regard to the 1946 Act argument, explicitly raised by the defendant in *Frank Music*, the court noted that prior to the 1946 Act, the Patent Act was silent regarding the availability of prejudgment interest. Nonetheless, prevailing patent plaintiffs recovered prejudgment interest, in addition to awards of both damages and profits. Thus, the *Frank Music* court reasoned, the availability of prejudgment interest by the express terms of the 1946 Act does not preclude awards of prejudgment interest under the 1909 Act.

E. *Prejudgment Interest Not Recoverable Under the Copyright Act of 1976*

Courts which decline to award prejudgment interest, while necessarily concluding that a prevailing plaintiff is not entitled to such an award, do not necessarily conclude that the Act of 1976 absolutely prohibits such awards. That is, a court can avoid the issue of whether the 1976 Act allows prevailing plaintiffs to recover prejudgment interest by holding that a particular plaintiff, on the facts of a particular case, is not entitled to such an award.¹¹⁴

112. *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 656 (2d Cir. 1978). The court outlined in table form the various damage awards the district court calculated, including an award of prejudgment interest. *Id.* The court stated that "[t]he only elements of the district court's award which warrant brief mention are those with respect to profits and statutory 'in lieu' damages." *Id.*

113. *See id.*; *see also* *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir. 1994) (recognizing the court's silent affirmance in *Lottie Joplin*).

114. *See supra* note 12 and accompanying text.

Therefore, there are two categories of cases: (1) those in which courts have explicitly held that the 1976 Act does not, under any circumstances, permit courts to grant prevailing plaintiffs prejudgment interest; and (2) those in which courts decline to award prejudgment interest in a particular case and avoid the issue of whether the 1976 Act may permit such awards.¹¹⁵

115. Since this Note addresses the issue of whether the 1976 Act permits courts to grant awards of prejudgment interest, this section of the Note only discusses the first category of cases. Nonetheless, numerous decisions under the 1976 Act fall into the second category of cases. *See, e.g.*, *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir. 1994) ("We need not address the question of whether prejudgment interest is appropriate in copyright infringement cases generally, because here the district court did not abuse its discretion in declining to make an award."); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, No. 91-56248, 1993 WL 39269, at *8 (9th Cir. Feb. 17, 1993) (refusing to grant prejudgment interest under specific facts of case and affirming district court's statement that "prejudgment interest was [not] unavailable as a matter of law"), *vacated in part on other grounds*, 24 F.3d 1088 (9th Cir.) (en banc), *cert. denied*, 115 S. Ct. 512 (1994); *United States Payphone Inc. v. Executives Unlimited of Durham Inc.*, 18 U.S.P.Q.2d (BNA) 2049, 2052 (4th Cir. 1991) (per curiam) (holding that it was not "stat[ing] a universal rule" in declining to award prejudgment interest); *Love v. Kwitny*, 772 F. Supp. 1367, 1373 (S.D.N.Y. 1991) (Mukasey, J.) (discussing conflicting decisions but holding that court need not reach a decision since plaintiff conceded that only in "special circumstances" should a court award prejudgment interest), *aff'd without op.*, 963 F.2d 1521 (2d Cir.), *cert. denied*, 113 S. Ct. 181 (1992); *Broadcast Music, Inc. v. Nortel Grill, Inc.*, No. CIV-89-1278E, 1991 WL 172079, at *2 (W.D.N.Y. Aug. 27, 1991) ("In the absence of any showing of inadequate compensation . . . , this Court opines that an award of prejudgment interest on statutory damages is inappropriate."); *Tracy v. Skate Key Inc.*, 14 U.S.P.Q.2d (BNA) 1248, 1250 (S.D.N.Y. 1990) (Mukasey, J.) (citing conflicting decisions and concluding "even assuming without deciding that prejudgment interest is available in some copyright cases, it would not be available in this case"); *Manufacturers Technologies, Inc. v. Cams, Inc.*, 728 F. Supp. 75, 84-85 n.10 (D. Conn. 1989) (declining to award prejudgment interest because plaintiff did not provide guidance as to how it should be calculated); *Blackman v. Hustler Magazine, Inc.*, 620 F. Supp. 792, 802 (D.D.C. 1985) (holding prejudgment interest is not "traditionally included" in a damage award under the 1976 Act), *aff'd in part and rev'd in part on other grounds*, 800 F.2d 1160, 1161 n.1, 1162 n.3 (D.C. Cir. 1986) (upholding district court's ruling with respect to the 1976 Act but reversing holdings under the 1909 Act).

Because courts do not always clearly draw this distinction, however, this Note also analyzes those cases in which the holding is not clear. Recently, the United States Supreme Court emphasized the importance of clarifying this type of confusion and uncertainty. *See Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1030 (1994) (in determining whether prevailing defendants under the 1976 Act are entitled to awards of attorneys' fees, the Court indicated that "[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the

The United States Court of Appeals for the Sixth Circuit, in *Robert R. Jones Associates v. Nino Homes*,¹¹⁶ appears to have held that prejudgment interest should not be awarded under the 1976 Act.¹¹⁷ The Sixth Circuit recognized the United States Supreme Court's decision in *Rodgers*, but held that "the measure of damages applied in this case [was] clearly sufficient to . . . deter unauthorized exploitation of someone else's creative expressions."¹¹⁸ Although the court appeared to limit its holding to the facts of the case, three aspects of the decision indicate that the court established a rule applicable to all cases under the 1976 Act.

First, the court relied upon *Bricklayers' Pension Trust Fund v. Taiariol*,¹¹⁹ for the proposition that "[i]n the absence of legislative direction, the Supreme Court, [in *Rodgers v. United States*, 332 U.S. 371 (1947)], directed that the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purposes underlying the obligations imposed by the statute in question."¹²⁰ Both *Rodgers* and *Taiariol* were decisions regarding whether otherwise silent statutes precluded awards of prejudgment interest.¹²¹ Therefore, the *Nino Homes* court's reliance on these decisions suggests that the court was addressing the issue of whether the 1976 Act prevents a court from awarding prejudgment interest.

Second, and perhaps most persuasively, the *Nino Homes* court

boundaries of copyright law be demarcated as clearly as possible").

116. 858 F.2d 274 (6th Cir. 1988).

117. *Id.* at 282.

118. *Id.* (emphasis added).

119. 671 F.2d 988 (6th Cir. 1982).

120. *Nino Homes*, 858 F.2d at 282 (quoting *Taiariol*, 671 F.2d at 989) (alteration in original).

121. For a discussion of *Rodgers*, see *supra* notes 48-52 and accompanying text. In *Taiariol*, the Sixth Circuit addressed the issue of whether the Labor Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974, both silent on the issue of prejudgment interest, permitted courts to award such damages. The district court in *Taiariol* concluded that the federal postjudgment interest statute, 28 U.S.C. § 1961 (1988), precluded awards of prejudgment interest in statutes which did not expressly authorize such awards. The Sixth Circuit reversed and remanded, holding that the Court's decision in *Rodgers* required the district court to examine the congressional purpose behind both acts. See *Taiariol*, 671 F.2d at 988-89.

further justified its refusal to award prejudgment interest by reasoning that

[t]he Patent Act, unlike the Copyright Act, expressly authorizes the court to award prejudgment interest. 35 U.S.C. § 284. This distinction in statutes governing similar activities suggests that Congress believed that giving the court in copyright infringement cases the discretionary authority to award costs and attorneys' fees would be sufficient to enable the court to enhance the deterrent force of the law in cases of flagrant misconduct.¹²²

By articulating its understanding of the purpose behind the remedial provisions of the 1976 Act, the *Nino Homes* court suggested that its holding should apply to all cases arising under the 1976 Act. Specifically, the *Nino Homes* court indicated that by granting courts the right to award costs and attorneys' fees, Congress eliminated the need for prejudgment interest.¹²³

Finally, *Nino Homes* relied on *Baldwin Cooke Co. v. Keith Clark, Inc.*¹²⁴ Although decided under the 1909 Act, *Baldwin Cooke* applied the same reasoning as *Nino Homes* in reaching its conclusion that the 1909 Act does not permit awards of prejudgment interest.¹²⁵ Significantly, *Baldwin Cooke* has been cited as a

122. *Nino Homes*, 858 F.2d at 282 n.8.

123. See, e.g., *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1551 n.8 (9th Cir. 1989) (citing *Nino Homes* for the proposition that prejudgment interest is "unnecessary to deter infringements in light of the availability under the 1976 Act of an award of profits and damages, as well as costs and attorneys' fees"), *cert. denied*, 494 U.S. 1017 (1990); *United States Naval Inst. v. Charter Communications, Inc.*, 17 U.S.P.Q.2d (BNA) 1063, 1067 (S.D.N.Y. 1990) (Leval, J.) (same), *aff'd in part on other grounds and rev'd in part*, 936 F.2d 692 (2d Cir. 1991); see also, e.g., *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 757 F. Supp. 1088, 1099 (S.D. Cal. 1990) (citing *Nino Homes* for the proposition that "prejudgment interest may not be awarded under the Copyright Act of 1976") (citation omitted), *aff'd*, 977 F.2d 1555 (Fed. Cir. 1992); *Tracy v. Skate Key Inc.*, 14 U.S.P.Q.2d (BNA) 1248, 1249 (S.D.N.Y. 1990) (Mukasey, J.) (same). It is also worthy to note that in the six years since *Nino Homes* was decided, no court in the Sixth Circuit has awarded, let alone addressed, prejudgment interest under the 1976 Act.

124. 420 F. Supp. 404 (N.D. Ill. 1976).

125. See *id.* at 409. The court reasoned:

[T]he Copyright Act, unlike the Patent Act (35 U.S.C. § 284), does not autho-

case in which a court precluded awards of prejudgment interest.¹²⁶

A recent decision in the Southern District of New York, *In Design v. Lauren Knitwear Corp.*,¹²⁷ declined to award a prevailing plaintiff prejudgment interest for reasons similar to those given by the *Nino Homes* court.¹²⁸ The *Lauren Knitwear* court recognized the United States Supreme Court's decision in *Rodgers*, but held that where a plaintiff received net profits and the full amount requested for attorneys' fees and costs, it was not necessary to award prejudgment interest because the dual purposes of the Act of 1976, compensation and deterrence, had been satisfied.¹²⁹ In strikingly similar fashion to the decision in *Nino Homes*, this holding suggests that the *Lauren Knitwear* court intended to limit its holding to situations where prevailing plaintiffs received this type of compensation.

On the other hand, the court also reasoned that "[t]he most recent trend . . . has been to deny prejudgment interest because an award without prejudgment interest will sufficiently compensate the plaintiff and deter the defendant from future infringement."¹³⁰ This

size prejudgment interest. Rather the Copyright Act, as we have seen, provides for an award of costs and a discretionary award of attorneys' fees in addition to the profits and damages authorized by Section 101(b).

We have concluded that even in a case of flagrant infringement such as that presented here, the cumulative award of defendant's profits and plaintiff's damages is sufficiently severe as to deter others from like conduct without the need for an award of prejudgment interest.

Id.

126. See, e.g., *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 698 F. Supp. 851, 852 (N.D. Okla. 1988) (citing *Baldwin Cooke* for the proposition that "[t]he majority view is that prejudgment interest is not recoverable"), *rev'd in part and aff'd in part on other grounds*, 921 F.2d 1036 (10th Cir. 1990); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 264 (D. Neb. 1982) (citing *Baldwin Cooke* for the proposition that "[p]rejudgment interest . . . is not authorized by the Copyright Act of 1976"); *Tracy*, 14 U.S.P.Q.2d (BNA) at 1249 (citing *Baldwin Cooke* for the proposition that "inasmuch as Congress has failed to provide for such interest in the Copyright Act, it is not available").

127. 782 F. Supp. 824 (S.D.N.Y. 1991) (Tenney, J.).

128. *Id.* at 837.

129. See *id.*

130. *Id.* (citing *United States Payphone Inc. v. Executives Unlimited of Durham Inc.*, 18 U.S.P.Q.2d (BNA) 2049, 2052 (4th Cir. 1991) (per curiam); *Robert R. Jones Assocs.*

language suggests a holding of more general applicability. Nonetheless, further confusing matters, two of the three cases cited in support of this proposition specifically limited their holdings to the factual situations before them.¹³¹

In contrast to these decisions, the court in *Broadcast Music, Inc. v. Golden Horse Inn Corp.*,¹³² explicitly held that prejudgment interest is not recoverable under the 1976 Act.¹³³ At the time of this decision, no reported case had permitted such an award.¹³⁴ However, the *Broadcast Music* court found support for its holding in a decision which addressed the 1909 Act.¹³⁵ The court reasoned that given the lack of any authority to the contrary, the Act of 1976 did not authorize courts to award prejudgment interest.¹³⁶ Similarly, citing the same authority, the United States District Court for the District of Nebraska, without any discussion, held that the Act of 1976 does not permit a prevailing plaintiff to recover prejudgment interest.¹³⁷

v. Nino Homes, 858 F.2d 274, 282 (6th Cir. 1988); *Tracy*, 14 U.S.P.Q.2d (BNA) at 1249-50). But see *BOORSTYN*, *supra* note 13, § 13.04, at 13-9 ("The more recent cases favor an award of prejudgment interest and the trend appears to be in that direction.").

131. See *United States Payphone*, 18 U.S.P.Q.2d (BNA) at 2052 (holding it was not "stat[ing] a universal rule"); *Tracy*, 14 U.S.P.Q.2d (BNA) at 1250 ("[E]ven assuming without deciding that prejudgment interest is available in some copyright cases, it would not be available in this case.").

132. 709 F. Supp. 580 (E.D. Pa. 1989). A different decision in the Eastern District of Pennsylvania reached the opposite conclusion, i.e., that prejudgment interest is available under the 1976 Act. See *Whelan Assocs., Inc v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1327-28 (E.D. Pa. 1985) (for further discussion of this case see *infra* notes 159-163 and accompanying text), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

133. *Broadcast Music*, 709 F. Supp. at 581.

134. See *id.*

135. See *id.* (citing with approval *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404 (N.D. Ill. 1976) (for further discussion of this case see *supra* notes 83-87 and accompanying text)). The *Broadcast Music* court did not address the fact that *Baldwin Cooke* involved a claim under the 1909 Act, not the 1976 Act. See *id.*

136. *Broadcast Music*, 709 F. Supp. at 581; see also *Love v. Kwitny*, 772 F. Supp. 1367, 1373 (S.D.N.Y. 1991) (Mukasey, J.) (recognizing that in *Broadcast Music* the court held that prejudgment interest is not "available under [the] 1976 Copyright Act, Congress having failed so to provide"), *aff'd without op.*, 963 F.2d 1521 (2d Cir.), *cert. denied*, 113 S. Ct. 181 (1992).

137. *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252,

F. *Prejudgment Interest Recoverable Under the Copyright Act of 1976*

The United States Court of Appeals for the Tenth Circuit, in *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*,¹³⁸ reversed a district court's denial of an award of prejudgment interest under the 1976 Act.¹³⁹ The Tenth Circuit followed decisions of the Tenth,¹⁴⁰ Seventh¹⁴¹ and Ninth Circuits,¹⁴² and held that although the Act of

264 (D. Neb. 1982) (citing with approval *Baldwin Cooke*, 420 F. Supp. at 409). This court also failed to address the fact that *Baldwin Cooke* involved a claim under the 1909 Act. See *id.*

138. 921 F.2d 1036 (10th Cir. 1990).

139. *Id.* at 1040-42.

140. The court relied on *United States Indus. v. Touche Ross & Co.*, 854 F.2d 1223 (10th Cir. 1988). See *Kleier*, 921 F.2d at 1041-42. In *Touche Ross*, the Tenth Circuit indicated that "under federal law prejudgment interest is ordinarily awarded, absent some justification for withholding it." 854 F.2d at 1256.

141. See *Kleier*, 921 F.2d at 1041-42 (citing with approval *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (Posner, J.)). In *Gorenstein*, the court held that prejudgment interest was available under the Lanham Act even though the statute made no reference to it. 874 F.2d at 436; see 15 U.S.C. § 1117(a) (1988) ("[S]ubject to the principles of equity . . . the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount."). The court further held, "[t]he time has come . . . to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay." *Gorenstein*, 874 F.2d at 436. Although the Seventh Circuit has yet to apply this rule to the 1976 Act, it has consistently followed this holding and upheld awards of prejudgment interest under other silent federal statutes. See, e.g., *Partington v. Broyhill Furniture Indus.*, 999 F.2d 269, 274 (7th Cir. 1993) (citing *Gorenstein* and upholding award of prejudgment interest under the Age Discrimination in Employment Act); *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991) (upholding award of prejudgment interest under ERISA and citing *Gorenstein*). But see *Fortino v. Quasar Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991) (distinguishing *Gorenstein* where damages were automatically doubled pursuant to statute and holding award of prejudgment interest would be punitive).

142. See *Kleier*, 921 F.2d at 1041 (citing with approval *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990)). The *Kleier* court cited *Frank Music* without addressing the fact that *Frank Music* arose under the 1909 Act and specifically declined to address the 1976 Act. See *Frank Music*, 886 F.2d at 1552 n.9 (for further discussion of this case see *supra* notes 93-111 and accompanying text); see also NIMMER, *supra* note 5, § 14.02[B], at 14-23 (noting that the citation to *Frank Music* "misses the mark"). One reason why this citation "misses the mark" is that under the *Frank Music* court's interpretation of the 1909 Act, prevailing plaintiffs can only recover the greater of defendant's profits or plaintiff's damages. See

1976 does not explicitly provide for prejudgment interest, a court may grant this relief.¹⁴³ The court reasoned that it would be "'anomalous' to hold that a plaintiff would be entitled to recover profits flowing from infringement but not revenue generated by the use of the profits."¹⁴⁴ In addition, according to the court, awards of prejudgment interest serve important deterrence and compensation functions.¹⁴⁵ In contrast, the court expressed concern that denying a prevailing plaintiff prejudgment interest would unjustly enrich the defendant.¹⁴⁶

A recent decision in the Southern District of New York recognized the absence of controlling precedent in the Second Circuit, but followed, without discussion, the reasoning of the Tenth Circuit in *Kleier* and granted an award of prejudgment interest.¹⁴⁷ Another

Frank Music, 886 F.2d at 1552. In contrast, by the express terms of the statute, prevailing plaintiffs under the 1976 Act can recover both profits and damages. See 17 U.S.C. § 504(a)(1) (1988).

143. *Kleier*, 921 F.2d at 1041-42.

144. *Id.* at 1041 (citing *Frank Music*, 886 F.2d at 1552).

145. *Id.* (citing *Frank Music*, 886 F.2d at 1550, 1552).

146. *Id.* (citing *Frank Music*, 886 F.2d at 1552).

147. *Bourne Co. v. Walt Disney Co.*, No. 91 CIV. 0344 (LLS), 1994 WL 263482, at *3 (S.D.N.Y. June 10, 1994) (Stanton, J.) (citing with approval *Kleier*, 921 F.2d at 1041).

In the Southern District of New York, various judges have reached conflicting results under the 1976 Act. To aid practitioners in the Southern District, the names of the district court judges appear after their decisions. See *Bourne*, 1994 WL 263482 at *3 (Stanton, J.) (holding prejudgment interest recoverable under the 1976 Act); *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 837 (S.D.N.Y. 1991) (Tenney, J.) (holding plaintiff not entitled to prejudgment interest under specific facts of case and appearing to hold prejudgment interest not recoverable under the 1976 Act); *Love v. Kwitny*, 772 F. Supp. 1367, 1373 (S.D.N.Y. 1991) (Mukasey, J.) (not reaching a decision on whether prejudgment interest is available under the 1976 Act because plaintiff conceded that only in "special circumstances" should a court award prejudgment interest and such was not this case), *aff'd without op.*, 963 F.2d 1521 (2d Cir.), *cert. denied*, 113 S. Ct. 181 (1992); *Dumas v. Dagl*, No. 88 CIV. 2293 (LBS), 1990 WL 258343, at *6-*7 (S.D.N.Y. May 22, 1990) (Sand, J.) (holding prejudgment interest available under the 1976 Act and allowing plaintiff to elect either actual or statutory damages); *Tracy v. Skate Key Inc.*, 14 U.S.P.Q.2d (BNA) 1248, 1250 (S.D.N.Y. 1990) (Mukasey, J.) (avoiding issue of whether prejudgment interest is recoverable under the 1976 Act and holding that plaintiff was not entitled to it based on facts of the case); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 864 (S.D.N.Y. 1984) (Haight, J.) (granting prevailing plaintiff "interest" under the 1976 Act from the date the action was filed without discussion or citation to any authority).

decision in the Southern District of New York, also without any discussion of the issue, awarded prejudgment interest under the 1976 Act.¹⁴⁸ The court relied on a decision in which the United States Court of Appeals for the Second Circuit, again without discussion, upheld an award under the 1909 Act which included prejudgment interest.¹⁴⁹ The court also gave plaintiff the option of electing either statutory or actual damages and appears to have held that prejudgment interest would be available under both.¹⁵⁰

In a case which exclusively involved the 1976 Act's statutory damages provision, the court in *Paramount Pictures Corp. v. Metro Program Network, Inc.*¹⁵¹ granted an award of prejudgment interest.¹⁵² The court noted the lack of precedent in the United States Court of Appeals for the Eighth Circuit and relied upon the decisions of three other circuit courts, including *Kleier*.¹⁵³ Although

148. *Dumas*, 1990 WL 258343 at *6.

149. *Id.* (citing with approval *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 656 (2d Cir. 1978)). The Second Circuit has recognized the *Lottie Joplin* court's silent affirmance of an award of prejudgment interest and has declined to address whether the 1976 Act permits plaintiffs to recover prejudgment interest. See *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir. 1994).

The *Dumas* court also cited *RSO Records*, 596 F. Supp. at 864 and *Larsen v. A.C. Carpenter, Inc.*, 620 F. Supp. 1084, 1125-26 (E.D.N.Y. 1985), *aff'd without op.*, 800 F.2d 1128 (2d Cir. 1986), to support its decision. In *RSO Records*, a copyright infringement action, the court, at the end of a fifteen page decision, granted the prevailing plaintiff, without any discussion, "interest" from the date the action was filed. 596 F. Supp. at 864. *Larsen* was an admiralty case in which the court awarded prejudgment interest. 620 F. Supp. at 1125-26.

150. See *Dumas*, 1990 WL 258343 at *7.

151. No. C89-0013, 1991 WL 348168 (N.D. Iowa Apr. 8, 1991) (Hansen, J.), *aff'd*, 962 F.2d 775 (8th Cir. 1992).

152. *Id.* at *12. This Note does not address whether a different rule regarding the availability of prejudgment interest should apply to awards of statutory damages. See *supra* note 5.

153. See *Paramount*, 1991 WL 348168 at *12 (citing with approval *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1040-42 (10th Cir. 1990); *Frank Music Corp. v. Premier Pontiac, Inc.*, 886 F.2d 1545, 1550-52 (9th Cir. 1989) (for further discussion of this case see *supra* notes 93-111 and accompanying text), *cert. denied*, 494 U.S. 1017 (1990); *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (for further discussion of this case see *supra* note 141)). The *Paramount* court failed to address the fact that *Frank Music* arose under the 1909 Act and specifically declined to address the 1976 Act. See *Frank Music*, 886 F.2d at 1552 n.9.

this case only addressed the statutory damages provision of the 1976 Act, the court's reliance on these decisions is an indication that it would reach the same result in a case for actual damages.¹⁵⁴ In fact, a different judge in the same district relied upon the same three decisions and upheld an award of prejudgment interest under the actual damages provision of the 1976 Act.¹⁵⁵

The United States District Court for the Eastern District of New York has also granted a prevailing plaintiff, without any analysis, prejudgment interest.¹⁵⁶ The case involved the complicated issue of whether the 1976 Act provides protection to computer programs.¹⁵⁷ On appeal, the Second Circuit did not address the award of prejudgment interest because the defendant abandoned its appeal from this aspect of the district court's decision.¹⁵⁸

In contrast to these decisions, the court in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*¹⁵⁹ engaged in a slightly more in-depth analysis. The court recognized the silence of the 1976 Act with respect to the issue of prejudgment interest, but noted that under the 1876 Patent Act, which was also silent on the issue, the United States Supreme Court granted awards of prejudgment inter-

154. Two of these decisions, *Frank Music* and *Kleier*, involved claims for actual damages and the *Paramount* court indicated that it found these decisions "well reasoned." See *Paramount*, 1991 WL 348168 at *12.

155. See *Kleier Advertising, Inc. v. John Deery Motors, Inc.*, 834 F. Supp. 311, 314 (N.D. Iowa 1993) (McManus, J.) (citing *Frank Music*, *Gorenstein* and the *Kleier* decision in the Tenth Circuit).

156. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 572 (E.D.N.Y. 1991), *aff'd in part and vacated in part on other grounds*, 982 F.2d 693 (2d Cir. 1992).

157. See generally Lisa C. Green, Note, *Copyright Protection and Computer Programs: Identifying Creative Expression in a Computer Program's Nonliteral Elements*, 3 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 89 (1992).

158. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992). The Second Circuit reversed the district court's ruling with regard to a preemption issue. *Id.* at 696-97.

159. 609 F. Supp. 1325, 1327-28 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). A different decision in the Eastern District of Pennsylvania reached the opposite conclusion, i.e., that prejudgment interest is not available under the 1976 Act. See *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 790 F. Supp. 580 (E.D. Pa. 1989) (for further discussion of this case see *supra* notes 132-136 and accompanying text).

est.¹⁶⁰ The *Whelan* court articulated the standard under which the United States Supreme Court upheld awards of prejudgment interest under the 1876 Patent Act¹⁶¹ and held, without citing any copyright case law, that "[b]y analogy, the same rule would appear to apply for copyright infringement."¹⁶² On the specific facts of this case, however, the court refused to award prejudgment interest.¹⁶³

In short, the Sixth Circuit, in *Nino Homes*, appeared to hold that prejudgment interest is not available under the 1976 Act. The *Nino Homes* court, in agreement with *Baldwin Cooke*, a 1909 Act case, found support for its holding in the availability of prejudgment interest, by the express terms of the statute, in the current version of the Patent Act. Unlike the *Baldwin Cooke* court, which focused on the plaintiff's recovery of both profits and damages, the *Nino Homes* court focused upon a court's discretionary ability to award attorneys' fees and costs under the 1976 Act. A recent decision in the Southern District of New York, focusing on a plaintiff's recovery of profits, costs and attorneys' fees, appeared to hold that prejudgment interest is not necessary under the 1976 Act.¹⁶⁴ More explicitly than either of these decisions, district courts in the Eastern District of Pennsylvania and the District of Nebraska have held that prejudgment interest is not available under the 1976 Act.¹⁶⁵

In much the same manner as the *Nino Homes* court cited a 1909 Act case to support its holding that prejudgment interest is not available under the 1976 Act, the Tenth Circuit, in *Kleier*, re-

160. See *Whelan*, 609 F. Supp. at 1327-28. Although the court failed to clearly state to which version of the Patent Act it was referring, it is clear that it was the 1876 version because the 1946 version explicitly gives courts the right to award prejudgment interest. See *supra* notes 53-56 and accompanying text.

161. See *Whelan*, 609 F. Supp. at 1327-28 (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448 (1936)). The Supreme Court's standard for awarding prejudgment interest under this version of the Patent Act was known as the *Duplate* standard. See *supra* note 55; *infra* note 201.

162. *Whelan*, 609 F. Supp. at 1328.

163. *Id.* The court focused on two factors: (1) lack of exceptional circumstances which would warrant an award of prejudgment interest; and (2) plaintiff's failure to suggest a method for computing an award of prejudgment interest. See *id.*

164. See *supra* notes 127-131 and accompanying text.

165. See *supra* notes 132-137 and accompanying text.

lied upon a 1909 Act case, *Frank Music*, in reaching its conclusion that prejudgment interest is available under the 1976 Act. While not directly addressing the arguments involving the various versions of the Patent and Copyright Acts, the *Kleier* court focused on the broad equitable principles underlying awards of prejudgment interest. Specifically, the court noted the apparent anomaly which would result in allowing plaintiffs to recover profits, but not the interest generated by the use of those profits. A number of district courts have relied upon *Kleier*, without significant independent analysis, in concluding that prejudgment interest is available under the 1976 Act.¹⁶⁶ In a slightly more in-depth analysis, the United States District Court for the Eastern District of Pennsylvania also held that prevailing plaintiffs can recover prejudgment interest under the 1976 Act.¹⁶⁷ In addition, the court adopted a standard for determining whether to award prejudgment interest in a particular case based upon an early version of the Patent Act, where plaintiffs could recover profits, damages and, although not by the terms of the statute, prejudgment interest.

III. ANALYSIS OF THE CONFLICTING DECISIONS

A. *Legislative History and Prejudgment Interest Theory*

In determining whether an otherwise silent statute permits a court to grant prejudgment interest, the United States Supreme Court, in *Rodgers v. United States*,¹⁶⁸ held that courts should examine "the congressional purpose in imposing [statutory obligations] and . . . general principles deemed relevant by the Court."¹⁶⁹ Al-

166. See *supra* notes 147, 151-155 and accompanying text.

167. See *supra* notes 159-163 and accompanying text.

168. 332 U.S. 371 (1947).

169. *Id.* at 373 (citing *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343 (1939)). The *Rodgers* test has been applied by the circuit courts to various silent statutory schemes. See, e.g., *United States v. Patty*, 992 F.2d 1045, 1050 (10th Cir. 1993) (applying *Rodgers* and upholding award of prejudgment interest under the Victim Witness Protection Act); *EEOC v. County of Erie*, 751 F.2d 79, 81 (2d Cir. 1984) (upholding award of prejudgment interest under the Equal Pay Act and applying *Rodgers*); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989-90 (6th Cir. 1982) (applying *Rodgers* and reversing

though the wisdom of delving into congressional reports for indications of legislative intent is frowned upon by some members of the Supreme Court,¹⁷⁰ *Rodgers* endorses such an inquiry, inasmuch as it directs courts to examine "congressional purpose." Legislative histories are not, however, always unequivocal. Rather, they often contain statements of general purpose which must be construed, as *Rodgers* indicates, in light of the specific purposes served by awards of prejudgment interest. After all, it would be a rare, but nevertheless relatively straightforward, case in which Congress failed, in statutory language, to provide for prejudgment interest, but clearly stated in the applicable legislative history that it should be readily available.¹⁷¹

district court's holding that neither the Employee Retirement Income Security Act nor the Labor Management Relations Act permits awards of prejudgment interest); *Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971) (upholding award of prejudgment interest under the Fair Labor Standards Act and applying *Rodgers*).

170. Although commentators have discussed the Court's general disapproval of legislative history as a source for interpreting statutory language, *see, e.g.*, Hon. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845-47 (1992), the Court has not gone so far as to eschew any reliance on legislative history. In fact, the Court distinguishes among different types of legislative history and has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (Rehnquist, J.) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The Court has rejected reliance on particular types of legislative history which it has deemed untrustworthy. *See Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (isolated remarks of a single senator not entitled to any weight); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (remarks of a bill's sponsor are not controlling and must be considered with Committee Reports from both Houses); *United States v. O'Brien*, 391 U.S. 367, 385 (1968) (Committee Reports are "more authoritative" than statements made during floor debate). This section of the Note, therefore, focuses on the 1976 Act's Committee Report. *See Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1028 (1994) (examining this Committee Report with respect to awards of attorneys' fees under the 1976 Act).

171. None of the decisions discussed in this Note addressed the legislative history of the 1976 Act. This complete absence of discussion suggests that courts may be concluding that such an inquiry is not necessary given the lack of direct reference to prejudgment interest in the legislative history. This conclusion, if accurate, stands in contrast to the manner in which courts have generally used legislative history in a *Rodgers* analysis. When neither the statute nor legislative history makes any direct reference to prejudgment interest, courts examine the general purposes served by the remedial provisions of a particular statute, as outlined in the applicable legislative history, in light of the purposes

The legislative history for section 504 of the 1976 Act contains three relevant statements of congressional intent. As to the first two, the report indicates:

The two basic aims of [section 504] are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.¹⁷²

These two aims appear to create a tension in terms of whether prejudgment interest should be available under the 1976 Act. On the one hand, Congress sought to give the courts "specific unambiguous directions" so as to avoid "the confusion and uncertainty" associated with damage awards under the 1909 Act. On the other hand, Congress intended to give the courts "reasonable latitude" to adjust damage awards to the specific facts of each case. The statement that section 504 was intended to provide "specific unambiguous directions" seems to indicate that awards of prejudgment inter-

served by awards of prejudgment interest. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1505-06 (6th Cir. 1989) (examining the legislative history of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") and concluding, without citing *Rodgers*, that prejudgment interest was compatible with CERCLA prior to passage of an amendment expressly providing for it), *cert. denied*, 494 U.S. 1057 (1990); *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 81-83 (1st Cir. 1984) (after noting that "both the Act [28 U.S.C. § 1875 (1988)] and its legislative history are barren of any reference to prejudgment interest[.]" the court concluded that prejudgment interest was recoverable under the Act because such an award "harmonize[d] nicely with the objectives of the statute"); *Marshall v. Security State Bank (In re Marshall)*, 132 B.R. 904, 907-08 (C.D. Ill. 1991) (examining legislative history of the Truth in Lending Act ("TILA") and concluding, based on this history, that TILA's statutory damages provision was a penalty and that therefore prejudgment interest was not recoverable), *aff'd*, 970 F.2d 383 (7th Cir. 1992); *In re W.L. Bradley Co.*, 78 B.R. 92, 93-94 (Bankr. E.D. Pa. 1987) (holding, after reviewing legislative history, that award of prejudgment interest under the Perishable Agricultural Commodities Act was consistent with Congressional intent).

172. 1976 Report, *supra* note 80, at 5777.

est are inappropriate, whereas the statement that section 504 grants the courts "reasonable latitude to adjust recovery" suggests the opposite.

One might argue that the "specific unambiguous directions" language suggests that prejudgment interest should not be available because this statement indicates that Congress intended the remedial provisions in section 504 to be exclusive and since prejudgment interest is not mentioned in section 504, it should not be available. This argument, however, is flawed for two reasons.

First, as a purely structural matter, the attorneys' fees and costs provisions of the 1976 Act are contained in section 505, not 504.¹⁷³ Therefore, Congress, by this statement, could not have intended to indicate that the provisions of section 504 are exclusive. Nonetheless, it is possible that this statement indicates that as to the remedial provisions contained in section 504, anything not provided for is excluded. This language, however, was likely not intended to exclude awards of prejudgment interest. Rather, as Congress stated, the "specific unambiguous directions" contained in section 504 were intended to avoid "the confusion and uncertainty that have marked [awards under the 1909 Act]."¹⁷⁴

Given the lack of any significant case law addressing the availability of prejudgment interest under the 1909 Act at the time the 1976 Act was passed,¹⁷⁵ it is doubtful that Congress was referring

173. See 17 U.S.C. § 505 (1988).

174. 1976 Report, *supra* note 80, at 5777.

175. By 1976, only two district court decisions, one of which was decided in 1976, had addressed whether prejudgment interest was available under the 1909 Act. See *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404 (N.D. Ill. 1976) (for further discussion of this case see *supra* notes 83-87 and accompanying text); *Davis v. E.I. DuPont de Nemours & Co.*, 257 F. Supp. 729 (S.D.N.Y. 1966) (for further discussion of this case see *supra* notes 88-92 and accompanying text). A third decision, in 1978, affirmed an award, without discussion, which included prejudgment interest. See *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651 (2d Cir. 1978) (for further discussion of this case see *supra* notes 112-113 and accompanying text). The leading case on the issue, *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545 (9th Cir. 1989) (for further discussion of this case see *supra* notes 93-111 and accompanying text), *cert. denied*, 494 U.S. 1017 (1990), was decided well after the 1976 Act was passed.

to prejudgment interest.¹⁷⁶ In addition, even a cursory examination of section 504 indicates that Congress was concerned with other issues which had given rise to "confusion and uncertainty" under the 1909 Act. Namely, as the rather lengthy provisions of sections 504(b) and (c) indicate, Congress was concerned about establishing that both profits and damages could be awarded, how those amounts should be calculated and resolving the complicated issue of statutory damages.¹⁷⁷ In sum, nothing indicates that Congress intended to preclude awards of prejudgment interest by stating that

176. *Cf. Allen-Myland, Inc. v. IBM Corp.*, 770 F. Supp. 1004, 1016 (E.D. Pa. 1991) (citing the "specific unambiguous" language in rejecting a party's suggestion that the court use a damage formula different from the one provided in section 504).

177. After Congress decided to revise the 1909 Act, the Register of Copyrights issued a report on the major issues to be addressed in the new law. *See* HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961). Addressing the damages provision, the report concluded by summarizing the major issues: (1) clarification of whether damages and profits, or damages or profits, can be awarded; (2) requiring proof of gross revenue rather than sales in computing profits; and (3) redrafting the statutory damages provision. *See id.* at 107. In addition to this report, the Senate asked a number of scholars to prepare articles on specific issues regarding the revision of the copyright law. Two reports addressing the damages provision of the 1909 Act were prepared. One report was based upon a survey distributed to copyright attorneys. *See* SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY 23, THE OPERATION OF THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW: AN EXPLORATORY STUDY (Comm. Print 1960) (Ralph S. Brown, Jr.). The survey did not inquire into the issue of prejudgment interest and, therefore, neither did this study. The other report was much broader in scope and addressed general problems arising under the 1909 Act. *See* SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY 22, THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW (Comm. Print 1960) (William S. Strauss). Significantly, this report concluded by focusing on the same three broad issues addressed in the Register's report and did not raise the issue of prejudgment interest. *See id.* at 31-32. Finally, two of the leading treatises on the 1976 Act also give some indication of what issues the revision process addressed. *See* NIMMER, *supra* note 5, § 14.01[B], at 14-6 ("One of the most obscure issues under the 1909 Act was the question of when statutory damages . . . might be properly awarded.") (footnotes omitted); WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 283 (6th ed. 1986) (discussing changes made by the 1976 Act in the statutory damages provision and noting the "confusion" over the damages and/or profits issue under the 1909 Act); *see also* ARTHUR B. HANSON, CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION—COMPARATIVE ANALYSIS OF THE ISSUES 142-45 (1973) (reviewing major areas of ambiguity under the 1909 Act and their resolution under the 1976 Act).

section 504 was intended to provide "specific unambiguous directions."

The second statement of Congressional intent regarding section 504 is much clearer with respect to its general implications. Congress stated that section 504 was intended "to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute."¹⁷⁸ This language is a clear indication that Congress intended to provide courts with "reasonable latitude" to equitably enforce the 1976 Act.¹⁷⁹ Holding that the 1976 Act, as a universal rule, precludes awards of prejudgment interest is not compatible with such an intention. Therefore, this language is a strong indication that granting courts the discretion to award prejudgment interest is consistent with Congressional intent.

Furthermore, in the third relevant statement of Congressional intent, Congress explained the dual functions awards of damages and profits serve: "Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act."¹⁸⁰ These dual functions are strikingly similar to the purposes served by awards of prejudgment interest; namely, compensation and prevention of unjust enrichment.¹⁸¹ Although this state-

178. 1976 Report, *supra* note 80, at 5777.

179. See *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369, 372 (D. Del. 1990) (in holding defendant not entitled to jury trial in case for injunctive relief and statutory damages, court cites "reasonable latitude" language for proposition that "the legislative history of section 504(c) seemingly stresses the equitable nature of the statutory damages remedy"); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 76 (S.D.N.Y. 1982) (citing this language to support holding allowing plaintiffs' infringement action to proceed in spite of prior arbitration award to related party); *Glazier v. First Media Corp.*, 532 F. Supp. 63, 65 (D. Del. 1982) (holding plaintiff not entitled to jury trial on statutory damages claim, court quotes "reasonable latitude" language and states that court should "exercise its discretion in determining what is just" (quoting *Rodgers v. Breckenridge Hotels Corp.*, 512 F. Supp. 1326, 1327 (E.D. Mo. 1981))); see also *Dumas v. Dagl*, No. 88 CIV. 2293 (LBS), 1990 WL 258343, at *3 (S.D.N.Y. May 22, 1990) (Sand, J.) (discussing this language in general analysis regarding calculation of actual damages).

180. 1976 Report, *supra* note 80, at 5777.

181. See *West Va. v. United States*, 479 U.S. 305, 310-11 n.2 (1987) ("Prejudgment

ment of Congressional intent is not an explicit endorsement of court awards of prejudgment interest, it is an indication that the purposes served by such awards are entirely compatible with the remedial purposes of the 1976 Act.¹⁸²

Overall, the Committee Report's statement that section 504 was intended to provide courts with "specific unambiguous directions" refers to areas of confusion under the 1909 Act. Given the dearth of case law addressing the availability of prejudgment interest at the time the 1976 Act was passed, and the complete absence of discussion this issue commanded in the various reports which provided the framework for amending the 1909 Act, this language should not be read to preclude awards of prejudgment interest. Furthermore, granting courts the discretion to award prejudgment interest is consistent with the legislative intent of giving courts "reasonable latitude to adjust recovery" and the general purposes served by awards of actual damages and profits.

interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." (citing *Rothschild*, *supra* note 2)); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983) ("A rule denying prejudgment interest not only undercompensates the [prevailing plaintiff] but also may grant a windfall to the infringer . . ."); *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1552 (9th Cir. 1989) ("Awarding prejudgment interest on the apportioned share of defendant's profits is consistent with the purposes underlying the profits remedy . . . [.] to prevent the defendant from being unjustly enriched . . ."), *cert. denied*, 494 U.S. 1017 (1990); *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (Posner, J.) ("Without [prejudgment interest], compensation of the plaintiff is incomplete . . ."); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders."); *supra* note 29 and accompanying text.

182. See *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1041 (10th Cir. 1990) ("[I]t would be 'anomalous' to hold that a plaintiff would be entitled to recover profits flowing from infringement but not revenue generated by the use of the profits." (quoting *Frank Music*, 886 F.2d at 1552)). But cf. *United States Naval Inst. v. Charter Communications, Inc.*, 17 U.S.P.Q.2d (BNA) 1063, 1067 (S.D.N.Y. 1990) (Leval, J.) (awarding prejudgment interest on damages portion of an award and finding "no justification" for awarding it on profit portion), *aff'd in part on other grounds and rev'd in part*, 936 F.2d 692 (2d Cir. 1991) (reversing award of copyright and profit damages, but upholding award of actual damages on contract theory and prejudgment interest on this amount under state law statutory grounds).

B. *Whether the Availability of Both Profits and Damages Under the 1976 Act Precludes the Need for Awards of Prejudgment Interest*

Much of the case law in this area has compared the 1976 Act to the 1909 Act and to two versions of the Patent Act. It is therefore important to understand the types of recovery authorized by these various Acts. Under the Patent Act of 1876 ("the 1876 Act") Congress allowed prevailing plaintiffs to recover both profits and damages,¹⁸³ but was silent on the issue of prejudgment interest.¹⁸⁴ After the 1946 amendments to this statute ("the 1946 Act"), prevailing plaintiffs have been able to recover, by the express terms of the statute, prejudgment interest and damages, but not profits.¹⁸⁵ Under the 1909 Copyright Act, which is silent on the issue of prejudgment interest,¹⁸⁶ courts are split on whether the Act permits a court to grant both profits and damages¹⁸⁷ or only the greater of the two.¹⁸⁸ The 1976 Act, in contrast, expressly allows courts to grant both profits and damages, but is also silent on the availability of prejudgment interest.¹⁸⁹

The United States Supreme Court in *General Motors* suggested that the absence of recovery for profits under the 1946 Act led Congress to provide for awards of prejudgment interest.¹⁹⁰ This reasoning supported the conclusion reached by the court in *Frank Music* that under its interpretation of the 1909 Act, a court's ability

183. See *General Motors*, 461 U.S. at 654 (citing *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 505 (1964)); *Frank Music*, 886 F.2d at 1552 n.9 (citing *Aro Mfg.*, 377 U.S. at 505). But see 1909 House Report, *supra* note 72, at 15 (stating that under the 1876 Patent Act "courts have usually [held] that the owner of the patent might have one or the other, whichever was the greater"). This difference may be traceable to the fact that the 1909 House Report was issued in 1909 and at that time courts "usually" so held, but by 1964, the time of the *Aro Mfg.* decision, the trend had changed and courts were allowing recovery of both profits and damages.

184. See 35 U.S.C. § 70 (1940).

185. See 35 U.S.C. § 284 (1988); see also *General Motors*, 461 U.S. at 654-55.

186. See *supra* notes 73-77 and accompanying text.

187. See *supra* note 110.

188. See *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1552 (9th Cir. 1989) (citations omitted), *cert. denied*, 494 U.S. 1017 (1990).

189. See 17 U.S.C. § 504 (1988).

190. See *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983).

to award only the greater of profits or damages constituted a quid pro quo for the general availability of prejudgment interest.¹⁹¹ The issue, therefore, is whether recovery of both profits and damages under the 1976 Act precludes awards of prejudgment interest.

The *Frank Music* court explicitly stated that it was not expressing an opinion on whether its reasoning was "dispositive in determining whether and when prejudgment interest should be awarded under the 1976 Copyright Act"¹⁹² The *Frank Music* court did not, however, eliminate the possibility that its reasoning would be considered persuasive in concluding that the 1976 Act precludes awards of prejudgment interest.¹⁹³ An inquiry into this issue is made all the more important in light of the Supreme Court's apparent agreement with *Frank Music*'s quid pro quo argument.¹⁹⁴

Both *Frank Music* and *General Motors* made these points in addressing the issue of what standard the courts should adopt in determining whether to award prejudgment interest. The 1946 Act explicitly authorizes courts to award prejudgment interest.¹⁹⁵ In *General Motors*, the Court discussed the shift in remedial provisions under the two Patent Acts and held that this shift indicated that prejudgment interest should "ordinarily be awarded" under the 1946 Act.¹⁹⁶ Likewise, in *Frank Music*, the court discussed its quid pro quo argument only after it held that prejudgment interest was

191. See *Frank Music*, 886 F.2d at 1552 n.9.

192. *Id.*

193. *Id.* This Note does not suggest that *Frank Music*, or any other case decided under the 1909 Act, can be appropriately used to support the conclusion that prejudgment interest is available under the 1976 Act. See NIMMER, *supra* note 5, § 14.02[B], at 14-23 (arguing that it is inappropriate to rely upon 1909 Act cases to determine whether prejudgment interest is available under the 1976 Act) (footnotes omitted); see also *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, No. 91-56248, 1993 WL 39269, at *8 (9th Cir. Feb. 17, 1993) (noting that *Frank Music* did not address whether prejudgment interest should be available under the 1976 Act and declining to resolve the issue), *vacated in part on other grounds*, 24 F.3d 1088 (9th Cir.) (en banc), *cert. denied*, 115 S. Ct. 512 (1994). The discussion of *Frank Music* in this part of the Note addresses not whether the decision supports awards of prejudgment interest under the 1976 Act, but whether its reasoning suggests that prejudgment interest should not be available under the 1976 Act.

194. See *General Motors*, 461 U.S. at 654-55.

195. See *supra* note 54 and accompanying text.

196. See *General Motors*, 461 U.S. at 655.

available under the 1909 Act.¹⁹⁷ It offered the quid pro quo argument in holding that prejudgment interest "ordinarily should be awarded" under the 1909 Act.¹⁹⁸ In sum, therefore, neither decision held that the availability of both profits and damages precluded the availability of prejudgment interest under a silent statute. Rather, both courts discussed this issue in terms of the standard courts should use in determining whether to award prejudgment interest.

Even assuming that the reasoning these courts applied to the standards question is applied to the issue of availability, there is nothing to suggest that the availability of both profits and damages erects a per se bar to the recovery of prejudgment interest.¹⁹⁹ In fact, as both *General Motors* and *Frank Music* recognized, the general availability of both profits and damages in the 1876 Act did not result in such a bar.²⁰⁰ Under the 1876 Act, which was silent on the issue of prejudgment interest, the Supreme Court established a standard pursuant to which courts could award profits, damages and prejudgment interest.²⁰¹ Although the 1876 Patent

197. See *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1551-52 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990).

198. *Id.* at 1552. At a different point in the opinion, the court indicated that "prejudgment interest [should be] generally available under the 1909 Act . . ." *Id.* at 1552 n.9.

199. *But see Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 409 (N.D. Ill. 1976) (holding that availability of both profits and damages under the 1909 Act precludes the need for awards of prejudgment interest).

200. See *General Motors*, 461 U.S. at 651-52; *Frank Music*, 886 F.2d at 1551.

201. See *Tilghman v. Proctor*, 125 U.S. 136, 160 (1888) (holding that patent damages are unliquidated, and absent special circumstances, an award did "not bear interest until after their amount has been judicially ascertained"). In *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448, 459 (1936), the Court reaffirmed this standard. In 1983, the Court summarized what had come to be known as the *Duplate* standard: "[P]rejudgment interest was generally awarded from the date on which damages were liquidated, and could be awarded from the date of infringement in the absence of liquidation only in 'exceptional circumstances,' such as bad faith on the part of the infringer." *General Motors*, 461 U.S. at 651-52 (citation omitted). The Court indicated that a plaintiff's damages were liquidated "if they were relatively certain and ascertainable by reference to established market values." *Id.* at 652 n.5 (citations omitted).

These cases did not specifically address the argument that the availability of both profits and damages precluded the need for awards of prejudgment interest. This suggests that the availability of both under the 1876 Act was simply not relevant to issue of prejudgment interest. Rather, as the *Duplate* standard itself indicates, the Court appears to

Act and the 1976 Copyright Act are two distinct Acts, the availability of prejudgment interest under the 1876 Act strongly suggests that the availability of both profits and damages under the 1976 Act does not preclude awards of prejudgment interest.²⁰²

Of course, an award of both profits and damages in a particular case may suggest that an additional award of prejudgment interest is cumulative and unnecessary.²⁰³ However, since it is not the case

have been more concerned with the classic distinction between liquidated and unliquidated damages. Therefore, before adopting the *Duplate* standard under the 1976 Act, its somewhat restrictive nature should perhaps be reevaluated under modern prejudgment interest theory. See *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 955 F.2d 831, 836 (2d Cir.) (noting that "old common-law rule of liquidated damages no longer retains its full vitality" and that the modern rationale behind awards of prejudgment interest "necessarily rejects much of the common law's approach to prejudgment interest") (citations omitted), *cert. denied*, 113 S. Ct. 394 (1992); *supra* notes 26-33 and accompanying text. In more recent times, "courts have moved steadily toward more liberal grants of interest, and have increasingly departed from standards based upon liquidation of claims . . ." DOBBS, *supra* note 1, § 3.5, at 174; see *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (Posner, J.) ("The time has come . . . to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations.").

202. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 & n.19 (1984) (recognizing the "historic kinship" between patent and copyright law and affirming the appropriateness of looking to patent law to help resolve novel problems in copyright law provided "caution" is used); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1327-28 (E.D. Pa. 1985) (holding, without significant discussion, that "[b]y analogy, the [*Duplate*] rule would appear to apply for copyright infringement[,] but declining to award prejudgment interest under specific facts of case), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); see also *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1041 n.3 (10th Cir. 1990) (holding prejudgment interest available under the 1976 Act and noting *Frank Music's* observation that prejudgment interest was available under patent law prior to adoption of the amendment expressly providing it).

203. See, e.g., *United States Payphone Inc. v. Executives Unlimited of Durham Inc.*, 18 U.S.P.Q.2d (BNA) 2049, 2052 (4th Cir. 1991) (per curiam) (indicating that it was not "stat[ing] a universal rule" regarding availability of prejudgment interest under the 1976 Act and holding that where plaintiff received actual damages and profits award of prejudgment interest would serve "no purpose") (footnote omitted); *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 837 (S.D.N.Y. 1991) (Tenney, J.) (not clearly resolving the issue of availability of prejudgment interest under the 1976 Act but holding that award of prejudgment interest was not necessary to fulfill the goals of the 1976 Act where plaintiff recovered net profits, attorneys' fees and costs); *Tracy v. Skate Key Inc.*, 14 U.S.P.Q.2d (BNA) 1248, 1250 (S.D.N.Y. 1990) (Mukasey, J.) (not reaching a conclusion about whether prejudgment interest is available under the 1976 Act but holding that where

that every prevailing plaintiff recovers both profits and damages, the availability of both should not give rise to a per se rule prohibiting awards of prejudgment interest. Indeed, granting courts the discretion to adjust recovery to the particular circumstances of a case is consistent with Congress' express intent.²⁰⁴

In *Robert R. Jones Associates v. Nino Homes*,²⁰⁵ the court offered a slightly different version of this argument in holding that awards of prejudgment interest are not necessary under the 1976 Act. It reasoned that the discretionary ability to award both attorneys' fees and costs sufficiently serves the 1976 Act's deterrence function.²⁰⁶ This argument, however, completely ignores the compensation function of the 1976 Act.²⁰⁷ In order to adequately compensate a plaintiff, prejudgment interest may be necessary.²⁰⁸ In fact, the Supreme Court has long recognized the compensation

plaintiff recovered actual damages and profits, and it appeared that the jury considered the amount recovered "appropriate" compensation, additional award of prejudgment interest was unnecessary to serve the goals of the 1976 Act); *see also Wickham Contracting*, 955 F.2d at 834 ("Awards of prejudgment interest must not result in over-compensation of the plaintiff."). Overall, as the Supreme Court has indicated, "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352 (1939) (citations omitted); *see Blau v. Lehman*, 368 U.S. 403, 414 (1962) (quoting *Board of Comm'rs* and indicating that the decision to award prejudgment interest rests with the discretion of the trial court).

204. *See supra* notes 178-179 and accompanying text.

205. 858 F.2d 274 (6th Cir. 1988) (for further discussion of this case *see supra* notes 116-126 and accompanying text).

206. *See id.* at 282 n.8.

207. *See Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1029 (1994) (rejecting one argument in favor of dual approach to awards of attorneys' fees under the 1976 Act "because it expresse[d] a one-sided view of the purposes of the Copyright Act. While it is true that one of the goals of the Copyright Act is to discourage infringement, it is by no means the only goal of that Act."); *United States Payphone*, 18 U.S.P.Q.2d (BNA) at 2052 ("Generally stated, the purpose of §504(b) of the Copyright Act of 1976 is to compensate the copyright owner and to discourage the infringer by disgorging his profits.") (citations omitted); *Lauren Knitwear*, 782 F. Supp. at 837 ("Generally, the purposes of the Copyright Act are to compensate the plaintiff and deter the defendant from future infringement." (citing *NIMMER*, *supra* note 5, § 14.01[A], at 14-4 to 14-5)); *supra* note 82 and accompanying text.

208. *See supra* note 181 and accompanying text.

function served by awards of prejudgment interest.²⁰⁹ In addition, the Court has also recognized that prejudgment interest serves to compensate plaintiffs for undue delay.²¹⁰ The *Nino Homes* court ignored this compensatory function of awards of prejudgment interest as well.

Even assuming that the *Nino Homes* court's omission of the compensation factor was unintentional, the court's holding would still be flawed. That is, assume the *Nino Homes* court held that the discretionary ability to award attorneys' fees and costs adequately serves the deterrence and compensatory functions of the 1976 Act and thereby renders awards of prejudgment interest unnecessary. The flaw in this reasoning stems from a refusal to distinguish the different functions served by awards of attorneys' fees, costs and prejudgment interest. As previously discussed, the modern rationale behind awards of prejudgment interest is based upon the recognition that money has a use value, and that a plaintiff's loss of this value is an element of damages to which the plaintiff is rightfully entitled.²¹¹ In contrast, awards of attorneys' fees and costs are "not based upon losses caused by actionable conduct, only those caused by the litigation itself"²¹² Thus, prejudgment interest compensates for the loss of the use of money which rightfully belonged to the plaintiff, whereas attorneys' fees and costs allow plaintiffs to recover their litigation expenses.²¹³ To argue that the

209. See *supra* note 181 and accompanying text.

210. See *Missouri v. Jenkins*, 491 U.S. 274, 281 n.3 (1989) (noting that prejudgment interest serves as "compensation for delay" (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986))); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983) ("A rule denying prejudgment interest . . . create[s] an incentive to prolong litigation."); see also *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (Posner, J.) ("Without [prejudgment interest], . . . the defendant has an incentive to delay.").

211. See *supra* notes 28-29, 56, 61-62 and accompanying text.

212. DOBBS, *supra* note 1, § 3.8, at 191.

213. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) ("[U]nlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment, prejudgment interest traditionally has been considered part of the compensation due plaintiff.") (citation omitted); *Library of Cong.*, 478 U.S. at 321 (prejudgment interest "is considered as damages, not a component of 'costs.' Indeed, the term 'costs' has never been understood to include any interest component") (citations

discretionary ability to award attorneys' fees and costs compels a per se prohibition on the availability of prejudgment interest ignores this crucial distinction.

In short, the availability of damages, profits and prejudgment interest under the 1876 Act suggests that it is not inappropriate to award prejudgment interest under the 1976 Act. Furthermore, since every prevailing copyright plaintiff does not recover both profits and damages, courts should have the discretionary ability to award prejudgment interest. The decision in *Nino Homes* rejecting the availability of prejudgment interest is flawed for two reasons: (1) it ignored the compensation function of the 1976 Act; and (2) it failed to distinguish between the different purposes served by awards of costs, attorneys' fees and prejudgment interest.

C. The Impact of the United States Supreme Court's Decision in Monessen on the Availability of Prejudgment Interest Under the 1976 Act

Although the United States Supreme Court's decision in *Rodgers* permits courts to grant prevailing plaintiffs prejudgment interest under silent statutory schemes, the Court has denied such awards under some silent statutes. Prior to the Court's recent decision in *Monessen Southwestern Railway v. Morgan*,²¹⁴ the Court seemed to limit such denials to fairly specific categories.²¹⁵ In *Monessen*, the Court suggested a broader basis for denying prevailing plaintiffs the right to recover prejudgment interest.²¹⁶ It is

omitted).

214. 486 U.S. 330 (1988).

215. See, e.g., *Rodgers v. United States*, 332 U.S. 371, 374 (1947) (prejudgment interest not recoverable where plaintiff's damages were in the nature of a criminal penalty); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945) (prejudgment interest not recoverable where statute provided for automatic award of liquidated damages).

216. Two recent circuit court opinions addressed the potentially broader application of *Monessen*. See *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 955 F.2d 831, 837-38 (2d Cir.) (distinguishing *Monessen* and holding that it does not preclude awards of prejudgment interest under the Labor Management Relations Act), cert. denied, 113 S. Ct. 394 (1992); *Randolph v. Laeisz*, 896 F.2d 964, 968-69 (5th Cir. 1990) (distinguishing *Monessen* and rejecting defendant's argument that it precludes awards of prejudgment interest under the Longshore and Harbor Workers' Compensation

therefore necessary to determine whether this broader basis suggests that prejudgment interest should not be available under the 1976 Act.

In *Monessen*, the Court held that under the Federal Employers' Liability Act ("FELA"), which is silent regarding the availability of prejudgment interest, prevailing plaintiffs could not recover prejudgment interest.²¹⁷ Specifically, the Court focused on two factors in reaching its holding: (1) the nature of the underlying claim and the prohibition of awards of prejudgment interest on such claims at the time FELA was passed; and (2) Congress' failure to amend FELA in the face of long-standing judicial refusal to award prejudgment interest.²¹⁸ These factors, when analyzed in light of the Act of 1976, do not preclude courts from awarding prejudgment interest.

As to the first factor, in *Monessen* the underlying claim was for personal injury.²¹⁹ According to the Court, the common law at the time FELA was passed did not permit plaintiffs in personal injury cases to recover prejudgment interest.²²⁰ Furthermore, while Congress had amended FELA to expressly dispense with other common law doctrine, it had not done so with prejudgment interest.²²¹ Copyright claims under the 1976 Act are unliquidated and, in sharp contrast to claims for personal injury, since the turn of this century, courts, including the Supreme Court, have awarded prejudgment interest on unliquidated claims.²²² In addition, while Congress

Act).

217. *Monessen*, 486 U.S. at 336-39.

218. *See id.* at 337-39.

219. *Id.* at 332.

220. *Id.* at 337 (citations omitted).

221. *Id.* at 337-38. In order to provide injured workers with "liberal recovery," Congress amended FELA to eliminate the defense of contributory negligence. *Id.* at 337 (citation omitted).

222. *See supra* notes 39-44, 201 and accompanying text; *see also* Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 837-38 (2d Cir.) (distinguishing *Monessen* on the grounds that common law rule barring recovery of prejudgment interest on unliquidated claims had "eroded severely" by the time the Labor Management Relations Act was passed in 1947), *cert. denied*, 113 S. Ct. 394 (1992); *cf.* Randolph v. Laeisz, 896 F.2d 964, 968-69 (5th Cir. 1990) (distinguishing *Monessen* in a maritime action because prejudgment interest is generally available in such actions). In

amended FELA to expressly dispense with other common law doctrines, Congress has only amended section 504 of the 1976 Act once to change the monetary limits on certain types of awards.²²³ Therefore, neither the nature of copyright claims nor Congress' sole amendment to the damages provision suggests that the holding in *Monessen* precludes awards of prejudgment interest under the 1976 Act.

Regarding the second factor, the Court first recognized that "Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'"²²⁴ Under FELA, courts had, "with virtual unanimity over more than seven decades[.]" held that prejudgment interest was not recoverable.²²⁵ In the face of Congressional inaction under such circumstances, the Court refused to allow prevailing plaintiffs to recover prejudgment interest.²²⁶ In contrast, under the 1976 Act, courts have neither addressed the issue for seven decades nor reached a virtually unanimous resolution of the issue.²²⁷ In fact, only a handful of courts have comprehensively analyzed the issue, and these decisions only began to appear approximately six years ago.²²⁸ Therefore, unlike

addition, in *Monessen*, Justice Blackmun argued that the majority had departed from the Court's "normal inquiry into the relation between an allowance of interest and Congress' purpose in creating an obligation" 486 U.S. at 348 (Blackmun, J., dissenting). Significantly, the majority responded by arguing that cases such as *Waite* and *General Motors* were distinguishable because "[i]n none of those cases did the plaintiff seek prejudgment interest on a cause of action arising under a statute that, like the FELA, was enacted at a time when prejudgment interest was generally unavailable on similar causes of action arising under the common law." *Id.* at 339 n.9.

223. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10(b)(1)&(2), 102 Stat. 2853, 2860 (1988) (codified as amended at 17 U.S.C. § 504(c) (1988)). These amendments raised the minimum and maximum awards under the 1976 Act's statutory damages provision.

224. *Monessen*, 486 U.S. at 338 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (alteration in original)).

225. *Id.* (citations omitted).

226. *Id.* at 339.

227. See *supra* notes 116-163 and accompanying text.

228. See, e.g., *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036 (10th Cir. 1990); *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988); see also, e.g., *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545 (9th Cir.

Congressional inaction with respect to FELA, Congress' silence with respect to the 1976 Act does not indicate an intent to preclude awards of prejudgment interest.²²⁹

Overall, neither of the factors deemed relevant by the Court in *Monessen* prevent a court from awarding prejudgment interest under the Act of 1976. The Act of 1976, unlike FELA, has not been the subject of extended judicial interpretation regarding the availability of prejudgment interest, nor has it been amended in the same manner, or as frequently, as FELA. In addition, copyright claims are unliquidated and in contrast to claims for personal injury, courts, including the United States Supreme Court, have long upheld awards of prejudgment interest on such claims.

CONCLUSION

Congress' silence with respect to the availability of prejudgment interest under the 1976 Act does not require a per se rule prohibiting its recovery. An examination of the applicable legislative history and the general purposes underlying awards of prejudgment interest supports the conclusion that it should be available under the 1976 Act. Neither the availability of both profits and damages under the 1976 Act, nor a recent Supreme Court decision refusing to allow prevailing plaintiffs to recover prejudgment inter-

1989) (1909 Act), *cert. denied*, 494 U.S. 1017 (1990).

229. See *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 955 F.2d 831, 837-38 (2d Cir.) (distinguishing *Monessen* on the grounds that under the Labor Management Relations Act "only a relatively small number of courts have considered directly the issue of prejudgment interest"), *cert. denied*, 113 S. Ct. 394 (1992); see also *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1032 (1994) (rejecting argument that case law under the 1909 Act compelled conclusion that Congress endorsed dual standard for awarding attorneys' fees under the 1976 Act because these cases failed to establish a clear standard); cf. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Ordinarily, 'Congress' silence is just that—silence." (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987))); *Monessen*, 486 U.S. at 345 n.3 (Blackmun, J., dissenting) ("[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." (quoting *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947))).

est under a different silent statutory scheme, compels a conclusion to the contrary.

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